

SOME RECENT AMENDMENTS.

(Passed in July and August, 1923.)

I.

In section 4, clause (r), after the words "means a pleader" the words "or a mukhtar" shall be inserted, and the words "mukhtar or" shall be omitted

This amendment has been made by the Criminal Procedure Code (Further Amendment) Act, XXV of 1923 For the reason of this amendment, see page 18 of this book

II

In sec 364,—

(a) in subsection (3) the words "unless he is a Presidency Magistrate" shall be omitted

(b) in subsection (4) for the words "or section 362, subsection (2A)" the following shall be substituted, namely—
"or in the course of a trial held by a Presidency Magistrate"

This amendment has been made by the Criminal Procedure Code Second Amendment Act, XXXVII of 1923 "The effect of the addition of the words 'or section 362, subsection (2A)' in section 364 (which words have been added by the Joint Committee of 1922) is that while the new subsection (2A) of section 362 has imposed an additional formality in connection with the examination of an accused person by a Presidency Magistrate in appealable cases, the formalities attending such examination have been materially relaxed in another respect, and that a memorandum of the substance of the evidence has been regarded as sufficient in appealable cases, while a full record in the form of question and answer is required in non appealable cases The Joint Committee did not intend that the amendments introduced would have this effect It is accordingly proposed to remove these anomalies, and to make it clear that in cases where an appeal lies, the Presidency Magistrate shall take down a memorandum of the examination of the accused person as already provided in the new subsection (2A) of section 362, and that in non appealable cases no record of the examination of the accused need be made"—*Statement of Objects and Reasons*, (Gazette of India, 1923, Part V, page 242)

III.

For section 388, the following section shall be substituted, namely,—

"388 (1) When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine, and the fine is not paid forthwith, the Court may—

Suspension of execution of sentence of imprisonment

(a) order that the fine shall be payable either in full on or before a date not more than thirty days from the date of the order, or in two or three instalments of which the first shall be payable on or before a date not more than thirty days from the date of the order, and the other or others at an interval or at intervals, as the case may be, of not more than thirty days, and

(b) suspend the execution of the sentence of imprisonment and release the offender, on the execution by the offender of a bond, with or without sureties, as the Court thinks fit, conditioned for his appearance before the Court on the date or dates on or before which payment of the fine or the instalments thereof, as the case may be, is to be made, and if the amount of the fine or of any instalment, as the case may be, is not realised on or before the latest date on which it is payable under the order, the Court may direct the sentence of imprisonment to be carried into execution at once

(2) The provisions of subsection (1) shall be applicable also in any case in which an order for the payment of money has been made on non recovery of which imprisonment may be awarded and the money is not paid forthwith, and if the person against whom the order has been made on being required to enter into a bond such as is referred to in that subsection fails to do so, the Court may at once pass sentence of imprisonment "

This amendment has been made by the Criminal Procedure Code Second Amendment Act, XXVII of 1923

IV.

After subsection (1) of section 562, the following subsection shall be inserted, namely—

'(1A) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code punishable with not more than two years' imprisonment and no previous conviction is proved against him the Court before whom he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental conditions of the offender, and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed instead of sentencing him to any punishment, *release him after due admonition*

This amendment has been made by the Criminal Procedure Code Second Amendment Act XXXII of 1913. It is to be noted that this new subsection is almost the same as the earlier part of the old section 562.

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- SCHEDULE II.—TABULAR STATEMENT OF OFFENCES.
- SCHEDULE III.—ORDINARY POWERS OF PROVINCIAL MAGISTRATES.
- SCHEDULE IV.—ADDITIONAL POWERS WITH WHICH PROVINCIAL MAGISTRATES MAY BE INVESTED
- SCHEDULE V.—FORMS

ERRATA.

IN SCHEDULE II,

- Against sec. 118 (if the offence be not committed), in the 5th column *for 'ditto' read 'bailable'.*
- Against sec. 119 (if the offence be not committed), in the 5th column, *for the words 'as in the offence abetted' read 'bailable'*
- Against sec. 120 (if the offence be not committed), in the 5th column, *for the word 'ditto' read 'bailable'.*
- Against sec. 213, in the 3rd column, *for 'Not Cog' 'Ditto' and 'Ditto' (one below the other), read 'Cog' 'Not Cog' and 'Not Cog' respectively*
- Against sec. 215, in the 3rd column, *for 'Ditto' read 'Cog'*
- Against sec. 294, in the 8th column, *for 'Ditto' read 'Any Magistrate'*
- Against sec. 317, in the 8th column, *for 'Ditto', read 'Court of Session, Presidency Magistrate or Magistrate of the 1st class'*
- Against sec. 318, in the 8th column, the words "or 2nd" shall be omitted
- Against sec. 327, in the 8th column, *after 'Court of Session' add 'Presideocy Magistrate or Magistrate of the 1st class'*
- Against sec. 328, in the 8th column, *for 'Ditto' read 'Court of Session'*
- Against sec. 343, in the 6th column, *for 'Not com' read 'compoundable with the Court's permission'*
- Against secs. 346 and 357, in the 6th column, *for 'Ditto' read "compoundable with the Court's permission"*
- Against sec. 363, in the 5th column, *for 'Not B' read 'Bailable'*
- Against sec. 364, in the 5th column, *for 'Ditto' read 'Not Bailable'*
- Against sec. 368, in the 8th column, *for 'Ditto' read 'Court of Session, Presidency Magistrate or Magistrate of the 1st class'*
- Against sec. 374, in the 3rd column, *for 'Ditto' read 'Not Cog'*
- Against sec. 403, in the 6th column, *for 'Not com' read 'compoundable with the Court's permission'*
-



ABBREVIATIONS.

Agra Niz. Adal ...	Agra Nizamat Adalut Reports	C L J. ...	E 1898
All. ...	... Indian Law Reports, Allahabad Series.	C L R. ...	
A. L. J.	... Allahabad Law Journal.	C. W. N. ...	ARCH, 1898.
A. W. N.	... Allahabad Weekly Notes	C. P. L R* ...	
B. L. R.	... Bengal Law Reports	Cr L J. ...	ating to
Bom	... Indian Law Reports, Bombay Series.	Ind Cas ...	amend the
B. H. C. R.*	... Bombay High Court Re- ports.	Ind Jur ...	y enacted as
Bom L R	... Bombay Law Reporter.	L. B R. ...	... Criminal Procedure in hands of the Law Amendment Bill's Act') and) Of these the ... general revision the amendment
Bur. L. J.	... Burma Law Journal.	L. W. ...	... h Subjects
Bur. L. R.	... Burma Law Reports	Lah. ...	... 1914 In that ... erial Legislative red to the Local
Bur L. T.	... Burma Law Times	Lah. L J ...	... ere received and
Bur. S R.	... Burma Sessions Reports.	Mad ...	... l was suspended ... vernment by a ... is Bill and the
Cal	... Indian Law Reports, Calcutta Series.	Mad Jur ...	... ong representa ... , Law Member ,
		M. H C R. ...	... raswami Sastry, ... Hon'ble Mr J.
		M L J ...	... mitted sat for 21
		M. L. T. ...	... 16 The H'las ... eral Leg' 11: 10

* The Civil and Criminal portions of these Reports nations. The pages of these Reports referred to in this pages of their Criminal portions.

Council on the 26th September 1917, but further consideration of the Bill was postponed until after the war. Meanwhile some further suggestions for the amendment of the Code were considered by the Government and after the termination of the war, a new Bill was prepared in 1921 which was substantially the Bill as revised by the above Committee, supplemented by the amendments regarded as advisable as a result of the consideration above referred to.

This Bill (no 3 of 1921) was introduced in the Council of State on the 21st February 1921 by Sir William Vincent, and on the 28th February he moved—and his motion was carried—that the Bill be referred to a Joint Committee, composed of representative members of the Legislative Assembly and the Council of State. On the 1st March however, the Legislative Assembly rejected the motion to refer the Bill to a Joint Committee, and the matter was dropped for the present. But at the next session, viz in September 1921, the Bill was again presented before the Legislative Assembly and Sir William Vincent was this time successful in getting it referred to a Joint Committee. This Committee sat for 14 days and submitted its report after a year (in September 1922), and the Bill as revised by this Committee, with certain alterations made during the discussions in the Council of State in September 1922 and in the Legislative Assembly in January and February 1923 ultimately passed into law, and has been enacted as Act XVIII of 1923.

The changes made from time to time by other minor Amendment Acts have been noticed in this book at their proper places.

[For Bill 3 of 1914 see Gazette of India, Part V, dated 28th March 1914, for the Report of the Select Committee of 1916, see Gazette of India, Part V, September, 1917 (reprinted in the issue of the Gazette of February 26, 1921 at p 39, for Bill 3 of 1921, see Gazette of India, Part V, February 26, 1921, for the Report of the Joint Committee, see Gazette of India, Part V, September 9, 1922. For Act XVIII of 1923 see Gazette of India, Part IV, April 14 1923, for Act XII of 1923, see Gazette of India, Part IV, March 24, 1923].

Pending cases are not affected by changes in the law—Enactments relating to procedure have no retrospective effect—2 Bom 148, 2 All 74. The general rule as to new laws of procedure is that they take effect from their coming into operation, so that the procedure from that date would be governed by such laws. It is also a general rule that such laws are not to affect vested rights. Therefore, where a person was tried under an old Code, and before the conclusion of the trial the new Code came into force, the trial ought to be continued in accordance with the procedure laid down in the earlier Code, which was in force at the commencement of the trial—6 Mad 336, 3 Bom L R 584.

PART I.

PRELIMINARY

CHAPTER I.

1. (1) This Act may be called the Code of Criminal
Short title. Com- Procedure, 1898; and it shall come into
mencement. force on the first day of July, 1898.

(2) It extends to the whole of British India; but, in the
Extent. absence of any specific provision to the
 contrary, nothing herein contained shall
 affect any special or local law now in force, or any special
 jurisdiction or power conferred, or any special form of
 procedure prescribed, by any other law for the time being in
 force, or shall apply to—

(a) the Commissioners of Police in the towns of
 Calcutta, Madras, and Bombay, or the Police in the
 towns of Calcutta and Bombay,

(b) heads of villages in the Presidency of Fort St.
 George; or

(c) village police officers in the Presidency of Bombay

Provided that the Local Government may, if it thinks fit,
 with the sanction of the Governor-General in Council, by
 notification in the official Gazette, extend any of the pro-
 visions of this Code, with any necessary modifications, to such
 excepted persons.

Object of the Code —The object of the Criminal Procedure Code is
 to provide a machinery for the punishment of offences against the
 substantive law—13 Bom 590; 16 Bom 580; 12 Cal 536; Ratanlal
 776 (at page 778); 16 Bom 661 (at page 669).

Extent—British India —The term "British India" shall mean all
 territories and places within Her Majesty's dominions which are for the
 time being governed by Her Majesty through the Governor General
 of India or through any Governor or other officer subordinate to the
 Governor General of India (Sec. 3, General Clauses Act, X of 1897.)

The following are within British India —Aden, Laccadive Islands (13 Mad 353), Andaman and Nicobar Islands (9 Bom 244), Ajmer and Merwara (9 Bom 244), Island of Perim (10 Bom 258)

Native States —The Native States and tributary Mahals are not within British India therefore this Code does not apply to Rajkot (10 Bom 186) Civil Station of Wadhwan (37 Bom 152, but see 9 Bom 244), Moyurbhanj (8 Cal 985) Keonjhar (16 Cal 667), the lands occupied by the Hyderabad State Railway (25 Cal 20 P C) Railway Station in a Native State (5 Bom L R 873)

But although the Code as such does not apply to the Native States, many of those States have in fact adopted it e.g. the Civil and Military Station of Bangalore (12 Mad 39) Mysore Kashmir the Native States in the Rajputana Agency, etc

Transfer of territory from British India to Native State —The British Court has jurisdiction to proceed with the trial of an offence committed in a territory which formed part of British India at the date of the offence and at the date of commitment to the Sessions, but was transferred to a Native State before the case came on for trial—34 All 118 Similarly the British Appellate Court has jurisdiction to hear the appeal if the transfer took place after a conviction but before the appeals therefrom were heard—33 All 578

Other places where the Code does not apply —The Code does not apply to the North Cachar Hills (26 Cal 874) or to the Chittagong Hill Tracts (27 Cal 654) It also does not apply to the Garo Hills the Khasi and Jaintia Hills the Naga Hills the North Cachar Subdivision of the Cachar District, the Mihar Hill Tracts in the Nowgong District the Dibrugarh Frontier Tracts in the Lakhimpur District and the Lushai Hills, see Assam Gazette 1898 Part II, page 788

Places to which the Code has been extended —The Code has been extended to the following places —(1) The District of *Anant* (with effect from 1st August, 1898), see Calcutta Gazette 1898, Part I p 779 (2) *Upper Burma* (excluding the Shan States) see Burma Laws Act (XIII of 1898) (3) the *Shan States* (by the Shan States Laws and Criminal Justice Order 1895 as amended by Notification no 29 dated 19 12 98 Burma Code) (4) the Scheduled Districts in *Ganyu* and *Liagapatam* see Fort St George Gazette, 1898 Part I, page 306 see also 23 M L J 670, (5) *Southern Perak* see Calcutta Gazette 1898, Part I, page 665, (6) Districts of *Muaribagh* *Iohardig* *Manthum*, *Palimau* *Paragur* *Dialbhum* and the *Kothan* in the Singbhum District, see Calcutta Gazette, 1898, Part I, page 714, and Gazette of India 1899 part I page 779 (7) *Pargana of Munpur* see Gazette of India, 1899 Part I page 119, (8) *British Baluchistan*, see Gazette

of India, 1898, Part 1, page 221, (9) *Chittagong Hill Tracts*, see section 4 of the Chittagong Hill Tracts Regulation 1 of 1900, but see 27 Cal 654

The Code has also been extended to the *British Protectorates* on the East Coast of Africa (Order of Council, 1897), *Somaliland* (Order 1899), the *Persian Gulf and Islands* (Order, 1897) and *Zanzibar* (Order, 1884 under which Zanzibar is to be treated as a District in the Bombay Presidency)

As regards *Muscat*, it has been held that the Bombay High Court is invested with original criminal jurisdiction over it, but not appellate or revisional jurisdiction—24 Bom 471

High Seas — The trial of a British seaman for an offence committed on the high seas on a British ship must be conducted under the Code of Criminal Procedure though the offence charged must be an offence under the English Law—21 Cal 782 16 Cal 238 1 B L K D C 1 7 B H C R 89 In 14 Bom 227 and 25 Bom 636 however, it was held that an offence committed on the high seas was an offence to which the Indian Penal Code (and not the English law) would apply

Special law — The expression 'special law' in this section has reference to statutory enactments and not to local family law—20 Cr I J 713 (Mad)

Local law This Code will not affect any local law, as for instance, Act XXXVII of 1885 which is still in force in Southern Peshawar—12 Cal 536 So also, the Criminal Procedure Code will not apply to proceedings held under the Sind Frontier Regulations (V of 1872 and III of 1891)—5 S L R 105—12 Cr L J 568

Special Jurisdiction — The following are instances of special jurisdiction — That conferred by sec 3 of Madras Act XXIV of 1839 regarding the administration of criminal justice in the Vizagapatnam Agency Tract—14 Mad 121 that conferred by secs 20 23, Cattle Trespass Act—23 Cal 300 34 Cal 926 that conferred by Bombay Village Police Act VIII of 1867—19 Bom 612

Special Powers — Instances — That conferred on second class Magistrates by Secs 3 (5) and 56 of the Bombay Abkari Act V of 1878—10 Bom 181, that possessed by the High Courts to punish for contempts—10 Cal 109 (P C) that possessed by the High Court under Sec 27 of the Letters Patent to transfer criminal cases before itself 6 Mad 32, the power of superintendence under Sec 15 of the Charter Act—12 C W N 678

Police of Calcutta Bombay — This Code does not apply to the Police in the city of Calcutta, unless expressly made applicable to them—11 Cal 557 Sec 155, however applies to the Police of Calcutta

Bombay—15 Cal. 595, 21 Bom 495 Also, Secs 42, 44, 54, 55, 56, 68, 83, 84, 85, 86, 127, 202 and col 2 of Schedule II have been specially extended to the Police in the towns of Calcutta and Bombay Secs 386 and 387 have been by notification under the proviso, extended to the Commissioner of Police for the town of Calcutta (see Calcutta Gazette, 23rd March 1904)

Madras Village Headmen —No part of this Code applies to Village Headmen who are empowered by Madras Reg. XI of 1816 and IV of 1821 to try petty cases—2 Weir 1. Secs 480 and 482 do not apply to Village Munsiffs—15 Mad 231

Bombay Village Police officers —The ancient village system of Police regulated formerly by Reg IV of 1818 and Reg XII of 1827 and now by Bombay Act VIII of 1867 remains unaffected by the Criminal Procedure Code—19 Bom 612

2 [Repealed by the Repealing and Amending Act, X of 1914]

3 (1) In every enactment passed before this Code comes into force, in which reference is made to, or to any chapter or section of, the Code of Criminal Procedure, Act XXV of 1861, or Act X of 1872, or Act X of 1882, or to any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code, or to its corresponding chapter or section

(2) In every enactment passed before this Code comes into force, the expressions, 'Officer exercising (or 'having') the powers (or the full powers) of a Magistrate,' "Subordinate Magistrate, first-class," and "Subordinate Magistrate, second class," shall respectively be deemed to mean "Magistrate of the first class," "Magistrate of the second class," and "Magistrate of the third class," the expression "Magistrate of a division of a district" shall be deemed to mean "Sub-divisional Magistrate" the expression "Magistrate of the district" shall be deemed to mean "District Magistrate", the expression "Magistrate of Police" shall be deemed to mean "Presidency Magistrate", and the expression "Joint Sessions Judge" shall mean "Additional Sessions Judge"

References to Code of Criminal Procedure and other repealed enactments

Expressions in former Acts

4 (1) In this Code the following words and expressions have the following meanings unless a different intention appears from the subject or context :

Definitions.

- (a) "Advocate-General" includes also a Government Advocate, or, where there is no Advocate-General or Government Advocate, such officer as the Local Government may, from time to time, appoint in this behalf :
- (b) "bailable offence" means an offence shown as bailable in the second schedule, or which is made bailable by any other law for the time being in force, and "non-bailable offence" means any other offence :
- (c) "charge" includes any head of charge when the charge contains more heads than one
- (d) "Chief Justice", includes also the Chief or Senior Judge of the Chief Court of Lower Burma
- (e) "Clerk of the Crown" includes any officer specially appointed by the Chief Justice to discharge the functions given by this Code to the Clerk of the Crown
- (f) "cognizable offence" means an offence for, and "cognizable case" means a case in, which a police-officer, within or without the presidency-towns, may, in accordance with the second schedule or under any law for the time being in force, arrest without warrant

Clause (f) —The words "a Police officer" in this clause do not mean "any and every Police officer" The power of arrest without warrant may be limited to any particular class of Police officers, but that does not prevent the offence being regarded as a cognisable one—27 Cal 144

But the power of arrest referred to in this clause must be an unqualified power, and not a conditional power like the one conferred upon the Police by sec 9, Opium Act I of 1878 which authorises a Police-officer to arrest without warrant if the accused does not furnish the security required by that section—24 Cal. 691

(g) "Commissioner of Police" includes a Deputy Commissioner of Police

(h) "complaint" means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence, but it does not include the report of a police officer

Clause (h)—Complaint —The word 'complaint' in sec 199 must be interpreted as bearing the same meaning as defined here 30 Cal 910 but in sec 195 the word is of wider import than this definition as that section clearly contemplates prosecution at the instance of Police officers —40 Cal 360

Who can make a complaint —A complaint need not necessarily be made by the person injured but by any person aware of the commission of an offence. The rule is that if a general law is broken any person has a right to complain, whether he himself has suffered any particular injury or not—13 Bom 60 21 Bom 536 20 Cal 481 41 Cal 1013 18 All 465 10 Cr L J 18 (All)

Essentials of a complaint The complaint must allege that an offence has been committed the use of a house as a brothel is not an offence, and a statement to a Magistrate that a certain person has so used his house is not therefore a complaint—6 S I R 254

So also, a petition to institute proceedings under sec 110 (27 Cal 662 6 C W N 163, 20 A W N 206, 1905 P R 12) or sec 145 (30 Cal 729) is not a complaint, because the allegations in support of proceedings under those sections do not amount to an offence

The complaint must be made to a *Magistrate* A Police officer is not a Magistrate, therefore a petition or information sent to such a person is not a complaint—6 All 96, 7 Mad 563, 30 Cal 285 30 Cal 690 (F B) 22 Bom 949, 24 A W N 266 So also an Agent of the Court of Wards is not a Magistrate—30 Cal 415 A Miratdar in his executive capacity is not a Magistrate—Ratanlal 554 But a Deputy Commissioner is an *ex officio* District Magistrate and a petition to him would amount to a complaint—13 N L R 13

The complaint must be made to a Magistrate with a view to his taking action under this Code A petition alleging that an offence has been committed, but that the petitioner did not desire to prosecute the wrong doer is not a complaint—6 C W N 926, a mere statement to a Magistrate by way of information without any intention of asking him to take action—36 All 222 17 C W N 980, 12 C W N 438 26

Mad 640, 27 Mad 127, or a petition sent by a husband to a Magistrate, not with a view to his taking action thereon, but to recover the jewels alleged to have been stolen by his wife, is not a complaint—16 Cr L J 466 (Mad), a petition making charges against a person and asking for an order of the Police to warn that person in the first instance is not a complaint—15 C W N 1051 a statement made to a Magistrate with the object of inducing him to take action not under this Code but under Sec 52 of the Bombay Gambling Act IV of 1887 is not a complaint within the meaning of this section—8 S L R 66

A complaint need not set out the details of the offence—32 Mad 3, but it must contain a statement of the facts relied on as constituting the offence in ordinary and concise language with as much certainty as the nature of the case will admit. A complaint in which no facts are set out, but only the words of the section of the Statute are literally copied is a colourable compliance with the requirements of the Statute—16 C W N 1105, 25 C W N 357

It is not necessary under this clause or under section 190 (1) that the person lodging the complaint must have personal knowledge of the facts constituting the offence—2, C W N 317 1 P L T 531—21 Cr L J 346

Complaints, what are.—The following have been held to be complaints—

(1) The petition of a complainant who has withdrawn his case and again asks to be allowed to proceed with the same—4 C W N 1000,

(2) the presentation of a petition by the complainant that his complaint should be inquired into—5 C W N 106

(3) a petition impugning the correctness of a police inquiry and praying for a trial of the accused—33 Cal 1, 18 Cr L J 754 (Pat),

(4) a letter to the Magistrate stating that a certain person had used insulting language against the complainant and asking the Magistrate to take action—17 C W N 448

(5) the submission of a record by an Assistant Magistrate trying a rent suit to the Collector who was also the District Magistrate, for starting a case under sec 193 I P C against the plaintiff in the rent suit—26 All 514.

(6) a *Produl* sent by a Revenue Officer to a Magistrate charging a certain person with having disobeyed a summons issued by him—11 Mad 443,

(7) an application by a complainant to have his witness summoned, coupled with his oral allegations, though not on oath nor reduced to writing 35 Cal 141

(8) proceedings of a Court under sec 476, sending a person to the nearest first class Magistrate—13 Bom 109, 13 Mad 144, 7 All 871, 31 Cal 664, 26 Mad 98, 32 Bon 184, (contra—32 Mad 49, 4 A L J 803, 26 Bom 785, 23 All. 249).

(9) a communication by a Revenue Court to the District Magistrate that certain documents tendered in evidence before it were forgeries and that such action might be taken as the Magistrate might deem fit—1905 P R 30.

(10) a petition to the Deputy Commissioner (who is an *ex officio* District Magistrate), describing the offence committed, naming the offender and expressly asking for his trial and punishment under a particular section of the I P C by a Subordinate Court—13 N L R 13,

(11) where the information is reported by the Police to be false and the complainant asks for a judicial inquiry into the charge made by him, his application amounts to a complaint—20 Cr L J 389 (Patna),

(12) where a 'committal sheet' signed by a Superintendent of the Salt Department was sent to the Magistrate (in accordance with the procedure laid down by para 12 of the 'Instructions issued by the Commissioner of Salt Revenue for the guidance of the Salt Revenue Department') and where the committal sheet contained *inter alia* a definite request to the Magistrate to summon certain witnesses and to try the accused for the offences set out in the sheet, *held* that the committal sheet was a 'complaint' within the meaning of this clause—1 P L J 592

(13) where A charged B with house breaking and B lodged an information against A for theft of his gun, but the Police reported B's case to be false, whereupon B filed a petition of objection asking the Magistrate to make an investigation and to summon the accused *held* that the petition of objection filed by B was a 'complaint'—3 P L J 346,

(14) where in the course of an insolvency proceeding the District Judge found that certain alienations made by the insolvent were fraudulent and the Judge made a report to the District Magistrate asking him to prosecute the transferees *held* that the report was a complaint—18 A L J 50

Complaints, what are not —

(1) statements made in a deposition by a complainant which disclose an offence—14 Bom L R 141 14 Bom L R 1166

(2) a letter merely conveying a sanction of the Local Government under sec. 196 authorising the prosecution—1895 P R 16,

(3) an application for issue of process—15 C W N 98

(4) a person for punishment under sec. 488 of the Code—1905 P. R. 50, 1005 P. R. 20, 1882 P. R. 17, 5 Cal 277, 16 Cal 743, 11 Mad 109, 18 Bom 445

Report of a Police Officer—The report referred to here does not mean a report under Chapter XIV exclusively but includes every report by a Police-officer, or any written information, even a verbal report by him—2 L. L. R. 125. In 6 S. L. R. 82, however, it has been held that the police report here referred to is a report made under sec. 173 after the conclusion of a Police investigation.

Police report, when and when not a complaint—The report of a Police officer contemplated by this clause is a statement made in connection with or at least under colour of the duty of the maker as a Police-officer. Where a police report goes beyond the duty of the Police officer making it, it is a complaint and not a Police report. Thus, it is not the duty of a prosecuting Police Inspector to report to a Magistrate offences under sec. 124 A I. P. C., but if he makes a report of such offences to a Magistrate, he does not make a report but a *complaint*—32 Mad 3. When the offence is a non cognisable one, there is no section in the Code which empowers a Police-officer of his own motion to make any report to a Magistrate, and if in such a case he does make a report, it is a complaint—26 Bom 150. So also, an information laid by a Police officer acting under sec. 51 of the Bombay District Police Act is not a report, but a complaint—6 S. L. R. 82.

If, however, the report is made by a Police officer investigating a case, under orders of a Magistrate having power to try the case, the report falls within the duty of the Police officer, and it is a report not a complaint—14 Cr. L. J. 218 (A'1).

(i) 'European British subject' means—

- (i) any subject of His Majesty of *European descent in the male line* born, naturalized, or domiciled in the *British Islands or any colony*, or
- (ii) any subject of His Majesty who is the child or grandchild of any such person by legitimate descent.

Change—The italicised words have been added by sec. 2 of the Criminal Law Amendment Act, VII of 1923 (popularly known as the 'Racial Distinctions Act'). These words have narrowed the definition, so that the number of persons who will be entitled to the privileges conferred by this Code on European British subjects will now be reduced by reason of the fact that they will only be claimable by persons of *European descent in the male line*.—Report of the Racial Distinctions Committee.

Clause (o)—Offence —This definition is the same as that given in Sec. 3 (37) of the General Clauses Act. The definition in Sec 40 I P Code is wider and includes acts committed outside British India. In the Extradition Act the word has a still wider meaning and is not restricted to offences as defined in Sec 40 I P C or in this Code—26 Mad 607

Civil wrong —Where an act may be a criminal offence or a mere civil wrong according to the intention of the person doing the act, the aggrieved party should not be encouraged to go into a Criminal Court unless he is fully prepared to prove that the act is criminal and not a mere civil wrong—1887 P R 50.

Offences, what are —(1) Breach of a husband's duty declared by the Magistrate's order, or a disobedience of such order—9 Bom 40.

(2) Failure to prepare and retain counterfoils of rent receipts as specified in Sec. 58 of the Bengal Tenancy Act—9 C W N, 816

(3) Omission to stamp a share-warrant under Sec 35 of the Indian Companies Act—20 Cal 676

(4) Illegal seizure of cattle mentioned in Sec 20 of the Cattle Trespass Act—34 Cal 926

(5) Omission by a workman to comply with an order made under clause (1) of Sec 2 of the Workmen's Breach of Contract Act—24 Mad 660, 33 Bom 22.

(6) Abetment of possession of opium in contravention of the Opium Act or rules thereunder—1884 P R 4

Offences, what are not —(1) Neglect to maintain wife or children—7 W. R. 10, 1885 P. R 13

(2) A mere breach of the contract under clause (1) of Sec 2 of the Workmen's Breach of Contract Act—24 Mad 660, 4 C W N 253 4 C. W N. 201; 4 Mad 234

(3) Inability to give a satisfactory account of oneself, or want of ostensible means of livelihood (sec. 109)—3 N L R 51

(4) Travelling in a train without pass or ticket (though it may be a breach of a Railway Rule)—20 All 95, 11 C W N 100

(5) The mere use of a house as a brothel—6 S L R 224, keeping a disorderly house—37 Cal 287

(6) An application to take proceedings under Sec 107 is not an accusation for an offence—1893 P R 16, 27 Cal 662, 20 Cal 729 See notes under sec. 107

(7) Gambling in a boat hired by the accused or in a compartment in a train is not an offence under Bombay Act IV of 1887—29 Bom 226; 30 Bom. 126

(8) Disregard of Cantonment Magistrate's direction to report the occurrence of a grievous illness—1885 P. R. 9.

(p) "officer in charge of a police station" includes, when the officer in charge of the police-station is absent from the station-house or unable from illness or other cause to perform his duties, the police officer present at the station-house who

[To page 17.]

Clause (r) of section 4 should now be read as follows—

(r) "Pleader" used with reference to any proceeding in any Court means a pleader or a *mukhtar* authorised under any law for the time being in force to practise in such Court, and includes (1) an advocate, a *vakil* and an attorney of a High Court so authorised, and (2) any other person appointed with the permission of the Court to act in such proceeding.

This amendment has been made by the Cr. P. C. Further Amendment Act XXXV of 1923 (recently passed in July). The reasons of this amendment have been sufficiently stated in page 18 of this book, under heading "Proposed amendment."

in any Court, means a pleader authorized under any law for the time being in force to practise in such Court and includes (1) an advocate, a *vakil*, and an attorney of a High Court so authorized, and (2) any *mukhtar* or other person appointed with the permission of the Court to act in such proceeding

Clause (r)—'Practise'—The word 'practise' does not connote the doing of acts habitually or often, but signifies the performance of even a single act by a person as a professional man, which as a private individual he could not do—26 All 380

A petition-writer who attends Court all day cannot be said to practise—18 W. R. 27. Only persons entitled to appear, plead or act in Court can be said to practise—14 Cal. 556 at page 565.

Mukhtar —The word refers to such Mukhtars as have obtained a certificate of qualification from the High Court—30 All 66 Even after obtaining such certificate, a Mukhtar is not entitled, as of right, to practise in Criminal Courts, he must obtain permission of the Court in each case (30 All 66, 38 Cal. 488), and subject to such permission he is authorised to practise both before Magistrates and Sessions Judges—38 Cal 488

License for one district —A pleader who held a license to practise in a particular district is not entitled as a matter of right to practise in a Criminal Court of another district unless duly authorised to practise in the latter Court—4 S L R. 207 It is the duty of a pleader who appears in a Criminal Court of a district to which his *sanad* does not apply, to inform the Magistrate that he cannot appear as of right, and to apply for a permission under this clause—7 S L R 98.

Other person —The words 'other person' embrace pure outsiders as well as duly qualified and enrolled mukhtars who failed to take out their certificates—14 Cal. 556.

[Proposed Amendment —Under the present law, a certificated mukhtar is not entitled as of right to practise in criminal Courts, but it is necessary for him to obtain permission of the Court in each case (though such permission is usually and generally granted), see the cases cited above Moreover, the mukhtars have been placed in the same category as ordinary persons without any training or license For this reason the mukhtars have a sentimental grievance and it is desirable that it should be removed It is therefore proposed to amend this clause as follows —

(r) "pleader" used with reference to any proceeding in any Court means a pleader or a mukhtar authorised under any law for the time being in force to practise in such Court, and includes (1) an advocate, a vakil and an attorney of a High Court so authorised, and (2) any other person appointed with the permission of the Court to act in such proceeding" (Bill no 6 of 1922, as amended by the Select Committee in 1923 See Gazette of India, 1923, part V, pages 129 131)

This amendment will do away with the necessity of obtaining permission of the Court, and will give a legal status to mukhtars]

(s) "police-station" means any post or place declared generally or specially by the Local Government to be a police-station, and includes any local area specified by the Local Government in this behalf

(t) "Public Prosecutor" means any person appointed under section 492, and includes any person acting

under the directions of a Public Prosecutor, and any person conducting a prosecution on behalf of Her Majesty in any High Court in the exercise of its original criminal jurisdiction.

Clause (1) — Public Prosecutor — The appointment of a Magistrate, who had in the first instance tried the accused, as a Public Prosecutor to conduct an inquiry subsequently directed in the case, is a most improper proceeding—5 B H C R 116

The complainant may appoint a pleader, and the Public Prosecutor may avail himself of his services, and the prosecutor does not thereby deprive himself of the management of the case—11 B H C R 102

(u) 'sub division' means a sub division of a district

(t) 'summons-case' means a case relating to an offence, and not being a warrant-case' and

(w) "warrant-case" means a case relating to an offence punishable with death, transportation, or imprisonment for a term exceeding six months.

Clause (w) — The term 'Sessions Case' has not been defined here. This term does not necessarily mean cases triable exclusively by the Court of Session, but includes all cases which a Magistrate has committed to a Court of Session, although he might have tried them himself—11 B H C R 98

Words referring to acts. (2) Words which refer to acts done extend also to illegal omissions, and

all words and expressions used herein, and defined in the Indian Penal Code, and not hereinbefore defined, shall be deemed to have the meanings respectively attributed to them by that Code

Words to have same meaning as in Indian Penal Code. But this is not always so, for instance, the term 'adultery' in section 488 of this Code should not be construed with reference to the definition given in the Indian Penal Code. Adultery on the part of the husband may not justify a conviction under section 497 I P C but it may be sufficient for the purposes of section 488 of this Code to entitle the wife to claim separate maintenance—20 Mad 470 (F. B.)

5 (1) All offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained.

Trial of offences under Penal Code

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying, or otherwise dealing with such offences.

Trial of offences against other laws.

Power of High Court to punish for contempt.—The power to punish for contempt vested in the High Court by the Common Law of England is not affected by the provisions of this Code. A contempt of the High Court by a libel published out of Court, when the Court is not sitting, is not included in the words "offences under the Indian Penal Code" or "offences under any other law" in Sec 5 of the Cr. P. Code, though the contempt may include defamation. It is something more than mere defamation and is of a different character which the High Court can deal with by virtue of its superior powers—10 Cal 109 (P. C.).

Subject to any special enactment.—Where a special enactment (e.g. the Bombay Prevention of Gambling Act IV of 1887) has provided a special procedure for the manner or place of investigating or inquiring into any offence under it, its provisions must prevail, and no provisions of the Criminal Procedure Code can apply. Where, however, the special Act is silent, the Cr P C would be applicable—31 Bom 438.

The Gambling Act III of 1867, sec 5, prescribes a special procedure for searches under that Act, and the provisions of Chapter VII of this Code shall not apply thereto—3 Lah 359.

A simultaneous conviction under the Indian Penal Code as well as under a special law for the same offence is illegal—5 N W P. H. C. R 49.

"Enactment" —A rule framed under any Act (e.g. Calcutta Rent Act) is not an 'enactment' within the meaning of clause (2) of this section—25 C. W. N. 661.

PART II

CONSTITUTION AND POWERS OF CRIMINAL COURTS AND OFFICES

CHAPTER II

OF THE CONSTITUTION OF CRIMINAL COURTS AND OFFICES

A—Classes of Criminal Courts

6 Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force there shall be five classes of Criminal Courts in British India namely —

Classes of Criminal Courts

- I—Courts of Session
- II—Presidency Magistrates
- III—Magistrates of the first class
- IV—Magistrates of the second class
- V—Magistrates of the third class

Magistrate—Court—A Magistrate as such is not a Court unless he is acting in a judicial capacity—36 Cal 433

The Court of a Police Patel is not a Criminal Court within the enumeration contained in this section—Ratanlal 317

Presidency Magistrate—The term Presidency Magistrate would not be ordinarily included in the words Magistrate of the first class because sections 10 and 12 of the Code show that the District Magistrates and Magistrates of the first class are appointed only in districts outside the Presidency towns—32 Mad 303 Yet the term Magistrate of the first class used in Sec 111 of the Emigration Act (XX of 1883) means a Magistrate appointed to exercise the highest magisterial powers and includes a Presidency Magistrate—31 Bom 611, 32 Bom 10

District Magistrate—The Code does not recognise any Court other than the 5 classes mentioned in this section. A District Magistrate's Court is for the purposes of an ordinary criminal trial the Court of a Magistrate of the first class

The terms "Deputy Magistrate," "General Deputy Magistrate" are unknown to this Code, and should not be used—23 M L J 670

B—Territorial Divisions

7 (1) Every province (excluding the presidency-towns) shall be a sessions division, or shall consist of sessions divisions and every sessions division shall, for the purposes of this Code, be a district, or consist of districts

Sessions divisions and districts

(2) The Local Government may alter the limits, or, with the previous sanction of the Governor-General in Council, the number of such divisions and districts

Power to alter divisions and districts

(3) The sessions divisions and districts existing when this Code comes into force shall be sessions divisions and districts respectively unless and until they are so altered

Existing divisions and districts maintained till altered,

(4) Every presidency-town shall, for the purposes of this Code, be deemed to be a district

Presidency-towns to be deemed districts

Local Government may alter etc—This section assumes the existence of the Sessions Divisions in every part of British India, but does not contemplate the *creation* of such divisions by the Local Governments, which can only alter the limits or number of such divisions under subsection (2) of this section—30 Bom 274

Sessions Division—*Instances*—Cachar is a Sessions Division of Assam (see Assam Gazette, 1874, page 3) Dargeeling is included within the Purnea Division The District and Town of Rangoon are two Sessions Divisions for the purposes of this Code (see Gazette of India, 1874, p 62) The Ganjam Collectorate consists of two Sessions Divisions, one consisting of the Agency District, and the other of the Non Agency Tracts—23 M L J 670 The Districts of North and South Malabar are two Sessions Divisions in the Malabar District—30 Mad 136

8 (1) The Local Government may divide any district outside the presidency-towns into sub-divisions or make any portion of any such district a sub-division and may alter the limits of any sub-division.

Power to divide districts into sub-divisions

(2) All existing sub divisions which are now usually put
Existing sub-divisions maintained under the charge of a Magistrate shall be
 deemed to have been made under this
 Code

C—Courts and Offices outside the presidency towns.

9 (1) The Local Government shall establish a Court
Court of Session of Session for every sessions division, and
 appoint a Judge of such Court

(2) The Local Government may, by general or special
 order in the official Gazette, direct at what place or places
 the Court of Session shall hold its sitting, but, until such
 order be made, the Courts of Session shall hold their sittings
 as heretofore

(3) The Local Government may also appoint Additional
 Sessions Judges and Assistant Sessions Judges to exercise
 jurisdiction in one or more such Courts

(4) A Sessions Judge of one sessions division may be
 appointed by the Local Government to be also an Additional
 Sessions Judge of another division, and in such case he may
 sit for the disposal of cases at such place or places in either
 division as the Local Government may direct

(5) All Courts of Session existing when this Code comes
 into force shall be deemed to have been established under
 this Act.

The Additional Sessions Judge will try such cases as would be made
 over to him by the Sessions Judge But that does not oust the juris-
 diction of the Sessions Judge over those cases therefore} if a Sessions
 Judge makes over a particular appeal to the Additional Sessions Judge
 to be tried by the latter, he can afterwards withdraw the case from the
 latter, and take it on his own file and decide it—44 All 157

10 (1) In every district outside the presidency towns,
District Magistrate the Local Government shall appoint a
 Magistrate of the first class who shall be
 called the District Magistrate

(2) The Local Government may appoint any Magistrate of the first class to be an Additional District Magistrate and such Additional District Magistrate shall have all or any of the powers of a District Magistrate under this Code *or under any other law for the time being in force* as the Local Government may direct.

(3) *For the purposes of sections 192, sub-section (1), 407, sub-section (2), and 528 sub-sections (2) and (3), such Additional District Magistrate shall be deemed to be subordinate to the District Magistrate.*

Change —In sub section (2), the italicised words have been added, and the words "for a period not exceeding six months" occurring after the words "an Additional District Magistrate" have been omitted by the Criminal Procedure Code Amendment Act (XVIII of 1923)

Sub-section (3) has also been newly added by the same Amendment Act Prior to this amendment, the Code did not define the relation between a District Magistrate and an Additional District Magistrate Section 12 also did not make an Additional District Magistrate subordinate to a District Magistrate, and therefore the latter had no power under section 528 to transfer a case from a Subdivisional Magistrate to the Additional District Magistrate—34 Cal. 918 Under sub-section (3) newly enacted the District Magistrate has been expressly empowered to transfer cases under sec 528 to the Additional District Magistrate

District Magistrate —A District Magistrate is appointed in a district outside the Presidency towns Therefore a Presidency Magistrate is not included in the term 'District Magistrate'—32 Mad 303

The term 'Zillah Magistrate' used in the Bombay Regulations means a District Magistrate—3 B H C. R 11, 7 B. H C R 59. A Deputy Commissioner in a non-Regulation Province is a District Magistrate—16 W R 1.

A District Magistrate is subordinate to the Sessions Judge and cannot disregard the order of the latter—5 L B R 49

District Magistrate and 1st class Magistrate —Where a trial was commenced by an officiating District Magistrate and before its close, the officer reverted to his original position as First class Magistrate of the District, in which capacity also he had jurisdiction over the offence, it was held that he had jurisdiction to continue the trial This Code does not recognise any particular Court as that of the District Magistrate, but only Courts of First, Second and Third Class Magistrates—26 A. W. N. 201.

11 Whenever, in consequence of the office of District Magistrate becoming vacant, any officer succeeds temporarily to the chief executive administration of the district, such officer shall, pending the order of the Local Government exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate

12 (1) The Local Government may appoint as many persons as it thinks fit besides the District Magistrate, to be Magistrates of the first second, or third class in any district outside the presidency towns, and the Local Government or the District Magistrate subject to the control of the Local Government may, from time to time, define local areas within which such persons may exercise all or any of the powers with which they may respectively be invested under this Code

(2) Except as otherwise provided by such definition, the jurisdiction and powers of such persons shall extend throughout such district

Magistrate—A cantonment Magistrate is a Magistrate appointed under this section—1897 P R 1

Local area Although the expression 'local area' includes sessions division district or subdivision (25 Cal 858) still it appears 'sufficiently clear that the Legislature did not contemplate the exercise of jurisdiction by any Magistrate outside the limits of an area called a *District* in which he might be appointed by the Local Government—9 B m 40 A subdivisional Magistrate who has had his jurisdiction defined within a subdivision or local area in the district by order of the District Magistrate cannot take cognizance of a matter outside such local area—19 A I J 77 But where a notification, appointing a Magistrate did not specify any local area within which he was to exercise jurisdiction but conferred on him power to try 'all such cases as might be instituted in his Court', it was held that the notification by necessary implication conferred jurisdiction throughout the province—1901 P R 24

But a Magistrate having jurisdiction within a district cannot record a confession in a place *outside British India* (e.g. in a Native State

although the offence in respect of which the confession is made has been committed within that district—19 A. L. J. 355.

Jurisdiction throughout district :—Unless the powers of Magistrate have been restricted to a local area, he has jurisdiction over the entire district—29 Cal 389; 10 C. W. N. 1095 at page 1098; 24 O. C. 255; therefore a Magistrate appointed for a whole district, but put in charge of particular taluks only is not without jurisdiction, if he enquires into or tries a case in another taluk of the same district—U. B. R. (1892—96) 16.

A Magistrate in the division whose powers have not been formally limited to any particular portion of the division has jurisdiction to try an offence committed within the division although beyond the local limits of what was regarded as his jurisdiction—2 Weir 13.

Effect of transfer .—Since the jurisdiction of a Magistrate extends throughout the district, it follows that the transfer of a Magistrate from one local area to another local area in the *same district* does not oust his jurisdiction over the former area—22 Mad. 47; 9 A. L. J. 448.

But when a Magistrate is transferred to *another district*, his jurisdiction over the district in which he was originally appointed ceases as soon as he is relieved by his successor—3 All. 563; 19 All. 114; 15 C. P. L. R. 15

13 (1) The Local Government may place any Magistrate of the first or second class in charge of a sub-division, and relieve him of the charge as occasion requires.

Power to put Magistrate in charge of sub-division.

(2) Such Magistrates shall be called Sub divisional Magistrates.

(3) The Local Government may delegate its powers under this section to the District Magistrate.

Delegation of powers to District Magistrate.

14 (1) The Local Government may confer upon any person all or any of the powers conferred or conferrable by or under this Code on a Magistrate of the first, second, or third class in respect to particular cases or to a particular class or particular classes of cases, or in regard to cases generally, in any local area outside the presidency towns.

Special Magistrate.

(2) Such Magistrates shall be called Special Magistrates and shall be appointed for such term as the Local Government may by general or special order direct

(3) With the previous sanction of the Governor General in Council the Local Government may delegate, with such limitations as it thinks fit, to any officer under its control, the power conferred by subsection (1)

(4) No powers shall be conferred under this section on any police officer below the grade of Assistant District Superintendent, and no powers shall be conferred on a police officer except so far as may be necessary for preserving the peace preventing crime and detecting apprehending, and detaining offenders in order to their being brought before a Magistrate and for the performance by the officer of any other duties imposed upon him by any law for the time being in force

Any local area —The words 'any local area' could be extended to cover, if necessary all the territories administered by the Local Government issuing the Notification therefore where the Local Government by a Notification appointed a special Magistrate under this section with all powers of a first class Magistrate in regard to cases generally 'throughout the Panjab' it was held that the appointment was not *ultra vires*—1918 P R 7

15 (1) The Local Government may direct any two or more Magistrates in any place outside the presidency towns to sit together as a Bench and may by order invest such Bench with any of the powers conferred or conferrable by or under this Code on a Magistrate of the first second or third class and direct it to exercise such powers in such cases or such classes of cases only and within such local limits as the Local Government thinks fit

(2) Except as otherwise provided by any order under this section every such Bench shall have the powers conferred by this Code on a Magistrate of the highest class to which any one of its members who is present

Powers exercisable by Bench in absence of special direction

taking part in the proceedings as a member of the Bench, belongs, and, as far as practicable, shall, for the purposes of this Code, be deemed to be a Magistrate of such class.

Hearing by one Bench, decision by another—A case must be decided by the same Bench which heard the evidence and arguments. Where evidence for the prosecution was taken before two Honorary Magistrates, and on a subsequent day the evidence for the defence was taken and judgment delivered by a Bench consisting of one of those Magistrates and another, the High Court set aside the decision and ordered a new trial—20 Cal 870, 12 Cal. 558, 38 Mad. 304, 23 Cal 194; 41 All. 116

Absence of some of the Magistrates—Where a trial was begun before a Bench of seven Magistrates, and when the judgment was pronounced, only five out of the seven were present, it was held that the mere circumstance that two out of the seven Magistrates were absent on the day on which the accused was convicted did not affect the legality of the conviction—21 Mad. 446; 1914 M. W. N 867. Where two Magistrates who decided a case sat throughout the trial and constituted a quorum of the Bench, the trial will not be vitiated by the mere fact that two other Magistrates who were not necessary to the quorum and who were present at the time of the commencement of the enquiry were not on the Bench at the time of the decision of the case—3 N. L. R 67. But where in the course of the trial by a Bench consisting of a stipendiary and two honorary Magistrates, one of the honorary Magistrates was absent, and important evidence was recorded in his absence, but on the following day he resumed his seat and joined with the other Magistrates in signing the order for the conviction of the accused, it was held that the conviction was bad—13 C. L. R 212

So also, where in a trial before a Bench of Magistrates, one of the members constituting the Bench was absent on the date when witnesses were examined, it was held that the conviction of the accused was bad and that there must be a retrial—36 M. L. J 362. The trial of an accused by a Bench of Magistrates, one of whom did not hear the entire evidence, is bad in law, and a conviction by such Bench cannot be sustained—1932 P. L. R 1=22 Cr. L. J 511, 23 Bom. L. R. 833. It is wrong that a Magistrate who has been absent during part of the trial should express an opinion on evidence which he has not heard, and possibly influence his fellow Magistrates who were in a better position than he was to decide the case—23 Bom. L. R 833. So also, where a case was heard by a Bench consisting of two Magistrates

who formed the Bench, but on the day on which judgment was pronounced, one of the members was replaced by another and he had not heard the evidence, and judgment was pronounced convicting the accused, it was held that as one of the members on the occasion when judgment was pronounced did not hear the evidence, it was difficult to say that the accused were not prejudiced, and consequently the trial was illegal—41 All 116.

Where a Bench of Magistrates established by the Local Government is, under the notification establishing it, to consist of not less than two members, one member of the Bench cannot alone adjudicate upon a case—22 A. W. N. 145. Similarly, a trial by two members of a Bench which according to rules must consist of not less than three members, is bad in law—16 Mad. 410.

Thus, where a Bench of three Magistrates constituted under the rules commenced a trial and heard the prosecution evidence but afterwards one member of the Bench was absent, and the remaining two Magistrates went on with the trial, heard the defence evidence and convicted the accused, *held* that the trial having been in contravention of the rules was void. The trial ought to have been adjourned till the absent member was present, or it should have been held afresh before a different set of Magistrates—44 Bom. 400.

Powers of a Bench.—Where a case triable by a first class Magistrate was at first tried by a Bench of Magistrates which could exercise first class powers when sitting *together*, but neither of whom was individually invested with first class powers, and at the adjourned hearing only one member of the Bench was present, it was held that he was not competent to try the case alone—2 C. L. R. 348.

Where there was a rule framed under this section, that only such cases as could be tried summarily should be transferred to the Bench, and in spite of this rule, a case not triable summarily but within the competency of the Bench was transferred to it and the Bench tried the case in the regular way, it was held that this contravention of the rule in transferring a case which the Bench could not try summarily came within Sec. 529 (f), and the trial by the Bench was valid—(1910) U. B. R. (Cr. P. C.) 70.

16 The Local Government may, or subject to the control

of the Local Government, the District Magistrate may, from time to time, make

Power to frame rules for guidance of Benches

rules consistent with this Code, for the guidance of Magistrates' Benches in any district respecting the following subjects:—

(a) the classes of cases to be tried;

to the Courts of Magistrates—26 Mad. 596. So also where a Subdivisional Magistrate revoked a sanction granted by a Sub-Magistrate, the Judge had no jurisdiction to interfere with that order—2 Weir 19; 2 Weir 155.

Delegation of power by District Magistrate —Clause (1) of Sec. 17 empowers only a District Magistrate to make rules or pass orders as to the distribution of work. Such power cannot be delegated by a District Magistrate to a Subdivisional Magistrate or to a senior Honorary Magistrate—36 All. 468.

D.—Courts of Presidency Magistrates.

18. (1) The Local Government shall from time to time, appoint a sufficient number of persons (hereinafter called Presidency Magistrates) to be Magistrates for each of the presidency-towns, and shall appoint one of such persons to be Chief Presidency Magistrate for each such town.

(2) The powers of a Presidency Magistrate under this Code shall be exercised by the Chief Presidency Magistrate, or by a salaried Presidency Magistrate, or by any other Presidency Magistrate empowered by the Local Government to sit singly, or by any Bench of Presidency Magistrates.

(3) *A Presidency Magistrate may be appointed under this section for such term as the Local Government may, by general or special order, direct.*

(4) *The Local Government may appoint any person to be an Additional Chief Presidency Magistrate, and such Additional Chief Presidency Magistrate shall have all or any of the powers of a Chief Presidency Magistrate under this Code or under any other law for the time being in force, as the Local Government may direct.*

Change —Subsections (3) and (4) have been added by the Criminal Procedure Code Amendment Act (XVIII of 1923). "The Local Government is given power to define the term for which a Presidency Magistrate may be appointed; and provision is made for the appointment of an Additional Chief Presidency Magistrate to meet the contingency of such an officer being needed, which has been actually experienced in Calcutta"—*Statement of Objects and Reasons* (Bill 3 of 1914).

Powers of a Presidency Magistrate —For the purposes of the Emigration Act a Presidency Magistrate is included in the term 'Magistrate of the First Class' in Sec 111 of that Act—31 Bom 611. But a Presidency Magistrate is not a District Magistrate or Magistrate of the First Class within the meaning of sec 52 of the Prisons Act, and has no jurisdiction to try for offences under that section—32 Mad 303.

A Presidency Magistrate has jurisdiction to charge, convict and punish under the Indian Penal Code a person who has committed an offence on the High Seas on board a British ship—25 Bom 636.

Under section 487 of this Code the Chief Presidency Magistrate has no jurisdiction to try a person under sec 188 I P C for disobedience of his own order—12 C W N 246.

Bench of Magistrates —This section confers the full powers of a Presidency Magistrate on a Bench of Honorary Presidency Magistrates and the Bench can therefore take action under sec 106 of this Code—7 Bom L R 833.

Sub section (4)—Any person —In the Bill of 1914 as well as of 1921 the words were any Presidency Magistrate but on the recommendation of the Joint Committee in 1922 the words Presidency Magistrate have been changed into the word person. The reason is thus stated.

We think there is force in the suggestion of the Calcutta Bar Library Club that it is not necessary to restrict the appointment of an additional Chief Presidency Magistrate to persons who are already Presidency Magistrates, and we have therefore substituted the words, "any person" for the words "any Presidency Magistrate"—*Report of the Joint Committee (1922)*

19 Any two or more of such persons may (subject to the rules made by the Chief Presidency Magistrate under the powers hereinafter conferred) sit together as a Bench

20 Every Presidency Magistrate shall exercise jurisdiction in all places within the presidency town for which he is appointed, and within the limits of the port of such town and of any navigable river or channel leading thereto as such limits are defined under the law for the time being in force for the regulation of ports and port dues

Within the limits of Port —A Presidency Magistrate of Calcutta has jurisdiction to try an offence committed under sec. 84 of the

Calcutta Port Act (III of 1890), outside the limits of Calcutta but within the limits of the port—47 Cal. 147 ; 24 C. W. N. 79.

21. (1) Every Chief Presidency Magistrate shall exercise within the local limits of his jurisdiction all the powers conferred on him by this Code or which by any law or rule in force immediately before this Code comes into force are required to be exercised by any Senior or Chief Presidency Magistrate, and may, from time to time, with the previous sanction of the Local Government, make rules consistent with this Code to regulate—

- (a) the conduct and distribution of business and the practice in the Courts of the Magistrates of the town ,
 - (b) the times and places at which Benches of Magistrates shall sit ;
 - (c) the constitution of such Benches ;
 - (d) the mode of settling differences of opinion which may arise between Magistrates in session , and
 - (e) any other matter which could be dealt with by a District Magistrate under his general powers of control over the Magistrates subordinate to him.
- (2) The Local Government may, for the purposes of this Code, declare what Presidency Magistrates *including Additional Chief Presidency Magistrates* are subordinate to the Chief Presidency Magistrate, and may define the extent of their subordination.

The italicised words have been added by the Criminal Procedure Code Amendment Act (XVIII of 1923). This amendment is consequent upon the amendment made in section 18(4) above.

Subordination.—In Bombay (and Calcutta) all Presidency Magistrates and Benches are subordinate to the Chief Presidency Magistrate and the Chief Presidency Magistrate has power to transfer a case from one Presidency Magistrate to another under Sec. 528 of this Code—1 Bom. L. R 347. But in Madras the Court of the Chief Presidency Magistrate and the Courts of the other Presidency Magistrates are of equal jurisdiction—10 M. L. T. 518.

Benches—Section 18 has conferred on Benches of Magistrates all

the powers of a Presidency Magistrate, and the Chief Presidency Magistrate has no power either to confer, restrict or enlarge these powers—7 Bom L R 833 Therefore, where a Chief Presidency Magistrate revived a case that had been dismissed and transferred it for trial to a Bench of Magistrates it was held that the latter had jurisdiction to entertain a preliminary objection as to the jurisdiction of the Chief Presidency Magistrate so to revive and transfer—7 C W N 527

E—Justices of the Peace

22 The Governor General in Council so far as regards the whole or any part of British India outside the presidency towns

Justices of the Peace for the mufassal

and every Local Government so far as regards the territories subject to its administration

may, by notification in the official Gazette appoint such persons resident within British India and not being the subjects of any foreign State as he or it thinks fit to be Justices of the Peace within and for the territories mentioned in such notification

Change—In para 2 the words (other than the towns aforesaid) have been omitted and in para 3 the italicised words have been substituted for the words 'European British subjects' (see sec 3 of the Criminal Law Amendment Act VII of 1923)

'By omitting section 23 and by assimilating the provisions of section 22 and 23, this clause has removed the qualification of being an European British Subject for being appointed as a Justice of the Peace'—*Notes on clauses* (Report of the Racial Distinctions Committee)

23 [Repealed]

24 [Repealed]

'Section 24 is incidentally repealed as being spent'—*Notes on clauses* (see supra under sec 22)

25 In virtue of their respective offices the Governor General Governors Lieutenant Governors and Chief Commissioners the Ordinary Members of the Council of the Governor General and the Judges of the High Courts are Justices of the Peace within and for the whole of British India Sessions Judges and District Magistrates are Justices of the Peace within and

Ex officio Justices of the Peace

for the whole of the territories administered by the Local Government under which they are serving ; and the Presidency Magistrates are Justices of the Peace within and for the towns of which they are respectively Magistrates.

F.—Suspension and Removal.

26. All Judges of Criminal Courts other than the High Courts established by Royal Charter, and all Magistrates, may be suspended or removed from office by the Local

Suspension and removal of Judges and Magistrates.

Government

Provided that such Judges and Magistrates as now are liable to be suspended or removed from office by the Governor General in Council only shall not be suspended or removed from office by any other authority.

27. The Governor General in Council may suspend or remove from office any Justice of the Peace appointed by him, and the Local Government may suspend or remove

Suspension and removal of Justices of the Peace.

from office any Justice of the Peace appointed by it

CHAPTER III.

POWERS OF COURTS

A—Description of Offences cognizable by each Court.

28 Subject to the other provisions of this Code, any offence under the Indian Penal Code may be tried—

Offences under Penal Code.

- (a) by the High Court, or
- (b) by the Court of Session, or
- (c) by any other Court by which such offence is shown in the eighth column of the second schedule to be triable

Illustration

A is committed to the Sessions Court on a charge of culpable homicide. He may be convicted of voluntarily causing hurt an offence triable by a Magistrate.

'Any other Court' —The provisions as to the other Courts indicated in this section do not cut down or restrict the jurisdiction of the High Court or the Sessions Court. This section gives powers to the High Court and the Court of Session to try any offence under the Penal Code—8 All 665

Commitment to Sessions —The illustration shows that in a case committed to the Sessions Court for a more heinous offence, the accused can be convicted of a minor offence triable by a Magistrate—19 All 465. So also, the fact that in a case committed to the Sessions, the Sessions Judge adds a charge of an offence triable exclusively by a Magistrate, does not affect the jurisdiction of the Sessions Judge to try it—8 All 665. There is nothing illegal in a Magistrate committing a person charged under section 147 I P C to the Sessions Court though the Schedule of this Code says that the offence is triable by a Magistrate only—24 Cal 429.

But if the offence falls under some other law and that law specifies the *forum*, it cannot be changed (see Sec 27). Thus, an offence under sec. 9 of the Opium Act must be tried by a Magistrate, a Sessions Judge has no jurisdiction over the offence and the Magistrate has no power to commit the case to the Sessions—19 All 465.

Offences within and outside jurisdiction —When an offence triable by an inferior tribunal contains an element which puts the offence beyond the jurisdiction of that tribunal, the jurisdiction of that tribunal is not thereby ousted—2 Weir 20 In other words, where the facts disclose an offence within the jurisdiction of the Magistrate, it is a complete fallacy to say that he is not empowered to try the offence merely because the same facts disclose a more serious offence beyond his jurisdiction—24 Mad 675 But no tribunal can properly clutch jurisdiction by intentionally ignoring facts of aggravation which make the offence really cognisable only by a higher tribunal—2 Weir 21 12 Mad 54 4 N L R 181

Where two or more persons are *jointly* indicted, and the jurisdiction of the Magistrate is ousted in the case of one of them the proper course is to commit both or all for trial before the Court of Session—1 Weir 448

29 (1) Subject to the *other provisions of this Code* any offence under any other law shall when any Court is mentioned in this behalf in such law, be tried by such Court

(2) When no Court is so mentioned it may be tried by the High Court or *subject as aforesaid* by any Court constituted under this Code by which such offence is shown in the eighth column of the second schedule to be triable

Change —In sub section (1) the italicised words have been substituted for the words 'subject to the provisions of sec 447', by the Criminal Law Amendment Act (VII of 1973)

In sub section (2) the italicised words have been added by the Criminal Procedure Code Amendment Act (XVIII of 1973)

Shall be tried by such Court —An offence under a special law triable by a special Magistrate cannot be transferred to an ordinary Magistrate or be tried by any other Magistrate—6 A W N 289, 5 M H C R 277 An offence under Sec 9 of the Opium Act must be tried by a Magistrate and not by a Court of Session—19 All 463 An offence under Madras Act I of 1868 (eg supplying liquor without a license) is triable only by a Magistrate and not by the High Court 5 M H C R 277 An offence under Sec 16 of the Bombay Village Police Act VIII of 1867 is triable by Police Patels duly empowered and not by Taluk Magistrates—Rumrill 196 An offence under Sec 57 of the Prisons Act is not triable by a Presidency Magistrate, since he is not a District Magistrate or a First Class Magistrate—32 Mad 303 A second Class Magistrate has jurisdiction to try offences under Sec 82 of the Magistra

tion Act and such jurisdiction is not affected by the provisions of Sec 29 of this Code - 7 Mad 347 A Third Class Magistrate has jurisdiction to try an offence under Sec 68, Bombay District Municipal Act—Ratanlal 763

An order under Sec 3 (1) of the Defence of India Act (IV of 1915) whereby the Local Government had directed that all persons accused of the offence of committing dacoity on 27th February 1915 at Bhat Naurang should be tried by the Commissioners appointed under the provisions of the said Act ousted the jurisdiction of the regular Courts in respect of the persons accused of the offence specified—1917 P R 38

When no Court is mentioned —Under Sec 58 (3) of the Bengal Tenancy Act, a Magistrate can try a landlord for failure to prepare and retain counterfoils of rent receipt in a summons case—9 C W N 816

29A. [New] *Every Magistrate of the second or third class shall inquire into or try any offence which is punishable otherwise than with fine not exceeding fifty rupees where the accused is an European British subject who claims to be tried as such*

Trial of European British Subjects by second and third class Magistrates

This section has been added by sec 6 of the Criminal Law Amendment Act (XII of 1923)

"The Bill does away with all provisions under which a person who may try a European British subject must be a Justice of the Peace. Except in cases punishable with sentences of fine only not exceeding rupees fifty, the Bill provides that European British subjects shall not be triable by second or third class Magistrates, but all first class Magistrates are given power to try European British subjects no matter what the nationality may be *Report of the Racial Distinction Committee*

— **29B [New]** *Any offence, other than one punishable with death or transportation for life committed by any person who at the date when he appears or is brought before the Court is under the age of fifteen years, may be tried by a District Magistrate or a Chief Presidency Magistrate or by any Magistrate specially empowered by the Local Government to exercise the powers conferred by section 8, sub section (1) of the Reformatory Schools Act, 1897, or in any area in which the said Act has been wholly or in part repealed by any other law providing for the custody, trial or punishment of youthful offenders, by any Magistrate em-*

Jurisdiction in the case of juveniles

powered by or under such law to exercise all or any of the powers conferred thereby.

This section has been added by the Criminal Procedure Code Amendment Act (XVIII of 1923). This amendment was for the first time introduced by Bill 3 of 1921 and did not exist in the Bill of 1914. The reasons for the amendment have been thus stated: "The existing procedure of committal to a Court of Session is lengthy and often involves the prolonged detention of juvenile offenders as undertrial prisoners, although the offences generally committed by them seldom require to be so severely punished as to necessitate the intervention of a Sessions Court the sentence or order eventually passed being often incommensurate with the time and energy expended upon a committal and sessions trial. It is therefore proposed that offences of children, unless so serious as to be punishable with death or transportation for life, should be triable by a District Magistrate, a Chief Presidency Magistrate, or by any Magistrate specially empowered to exercise the powers conferred by section 8, sub section 1, of the Reformatory Schools Act, 1897"—*Statement of Objects and Reasons* (1921)

30 In the territories respectively administered by the Lieutenant Governors of the Punjab and ^{Offences not punishable with death} Burma and the Chief Commissioners of Oudh, the Central Provinces, Coorg and Assam in Sind, and in those parts of the other provinces in which there are Deputy Commissioners or Assistant Commissioners, the Local Government may, notwithstanding anything contained in section 29, invest the District Magistrate or any Magistrate of the first class, with power to try as a Magistrate all offences not punishable with death

Magistrate must purport to act under this Section—A first Class Magistrate simply described on the heading of his judgment as invested with the powers under this Section, but not purporting to act under such powers, cannot exercise those powers in passing the sentence—1908 P W R 17

Powers of a District Magistrate to try cases—As a general rule, the cases which a District Magistrate should refrain from trying under his higher powers, are those in which a sentence more severe than a District Magistrate can inflict under Sec 34 appears to be called for if the offence be established and secondly those cases in which the issues are so complex or the difficulty of ascertaining the true facts or of cor

rectly applying the law to them so considerable as to make a trial before a Sessions Judge more appropriate than a trial before a District Magistrate—L B R (1893 1900) 219

An officer exercising special powers should rarely try a case himself, when there is some evidence which, if believed, would substantiate the charge of an offence beyond his jurisdiction—10 Cal 85 In the exercise of special powers under this Section, a District Magistrate has no power to try cases summarily—1879 P R 25, or to award compensation in a case under Sec 436 I P C which is ordinary triable by a High Court or Court of Session—1902 P L R 139

'Offence not punishable with death' —A District Magistrate empowered under this section cannot try an offence punishable with death—1891 P R 3 He cannot legally try the offence of culpable homicide amounting to murder Where there is credible evidence both of murder and of qualified murder, the accused should be committed for trial before a Court which is competent to try both offences once for all and to pronounce a judgment which shall be an effectual bar to a second trial on the same facts—1893 P R 1

So, where there is sufficient evidence to constitute an offence of murder, a Magistrate specially empowered may not try the case as on a minor charge—10 Cal 85 Similarly, the offence of attempting to wage war against the Queen should not be tried as a dacoity case by a District Magistrate—1 Bur S R 158

Commitment to Deputy Commissioner —A Magistrate holding an inquiry into a case triable by a Court of Session, cannot make over the case to a Deputy Commissioner, specially empowered under this section to try such cases Such a commitment was held to be illegal and was quashed and the case was ordered to be committed to the Court of Session—1873 P R 17 But in a Calcutta case the High Court maintained the conviction by the Deputy Commissioner, where it was found that the accused had not been prejudiced by such trial—7 C W N 457

Trial of approver —Where a Deputy Commissioner tries a case exclusively triable by a Sessions Court under powers conferred by this section, he does so as a Magistrate, and if he tenders conditional pardon to one of the accused, he is precluded from trying the case himself—10 C W N 847

Appeals —Where the Magistrate was acting in the exercise of his ordinary powers as a Magistrate of the 1st class and was not acting under the special powers conferred by this section, an appeal would lie to the Court of Session, and not to the High (Chief) Court—1881 P I 23 Where, however, it appeared from the sentence awarded that the District Magistrate in trying the particular case had exercised enhanced

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Appeals —Where the Magistrate was acting in the exercise of his ordinary powers as a Magistrate of the 1st class and was not acting under the special powers conferred by this section, an appeal would lie to the Court of Session, and not to the High (Chief) Court—1851 P 1 23 Where, however, it appeared from the sentence awarded that the District Magistrate in trying the particular case had exercised enhanced

powers under this section the appeal would lie to the High Court and not to the Court of Session—1877 P R 8, 1879 P R 33, 1880 P R 36, 1900 P R 12 If however the offence is not one exclusively triable by a Court of Session, and the sentence of imprisonment awarded does not exceed two years, an appeal lies to the Court of Session, and not to the High Court even though the District Magistrate records that he is exercising his powers under this section—1875 P R 10

Revision—A Sessions Judge is competent under Sec 437 to revise the order of a District Magistrate, even though the latter was exercising enhanced powers under this section—1904 P R 15

B—Sentences which may be passed by Courts of various Classes

Sentences which High Courts and Sessions Judges may pass

31 (1) A High Court may pass any sentence authorized by law

(2) A Sessions Judge or Additional Sessions Judge may pass any sentence authorized by law but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court

(3) An Assistant Sessions Judge may pass any sentence authorized by law, except a sentence of death or of transportation for a term exceeding seven years or of imprisonment for a term exceeding seven years

Transportation in default of fine—Under Sec 59 I P C it is competent to the Judge to award a sentence of transportation in lieu of a substantive term of imprisonment but this section does not authorise the substitution of transportation for the imprisonment provided by the Code in default of payment of fine 5 Mad 28

Request by the accused to pass greater sentence—The powers of the Magistrate to pass sentence are limited by this section Even a request by the accused to pass a greater sentence will not empower a Magistrate to pass a sentence which he is not authorised by law to pass—3 B L R App 50

Sentences which Magistrates may pass

32 (1) The Courts of Magistrates may pass the following sentences namely—

- | | | |
|--|---|---|
| (1) Courts of Presidency Magistrates and of Magistrates of the first class | { | Imprisonment for a term not exceeding two years including such solitary confinement as is authorized by law
Fine not exceeding one thousand rupees
Whipping |
|--|---|---|

- | | |
|---|---|
| (b) Courts of Magistrates of the second class | { Imprisonment for a term not exceeding six months, including such solitary confinement as is authorized by law.
Fine not exceeding two hundred rupees |
| (c) Courts of Magistrates of the third class | |

(2) The Court of any Magistrate may pass any lawful sentence, combining any of the sentences which it is authorized by law to pass

Punishment insufficient —When the punishment awardable by a Magistrate is insufficient for the offence, the case should be sent to a Court which can inflict adequate punishment—1893 I R 20

Nature of sentence must be defined —A Magistrate who pronounces a sentence must define precisely the nature of the sentence intended. Generally the sentence ought to be self contained—24 Mad 13

Sec 75 I P C —A Magistrate whose powers are limited by sec 32 of the Cr P C cannot pass an enhanced sentence under sec 75 I P C—I B R (1893 1900) 78 6 Bom L R, 548 Ratanlal 688

Solitary confinement —The punishment of solitary confinement can be awarded only for offences under the Penal Code—1866 P R 1701 1870 P R 20, 1875 P R 4 Thus a person convicted of an offence under section 35 of the Excise Act (1889 P R 17) or under section 48 of the Post Offices Act (1879 P R 24) is not liable to a sentence of solitary imprisonment

Again, solitary confinement can be awarded only as part of a substantive sentence of imprisonment (1863 P R 20 1882 P R 9) and not when such imprisonment is awarded in default of payment of fine (1873 P R 26 1887 P R 53) or in default of furnishing security—36 All 49,

But it is not illegal to award solitary confinement as part of an imprisonment awarded in lieu of whipping—1899 P R 14 nor is it illegal to impose solitary confinement as part of a sentence in a summary trial under Chapter XXII—6 All 83

A Magistrate has no power to direct that a sentence of solitary confinement should be undergone in the first week of every month, because the mode of such punishment is regulated by the Penal Code—5 C P L R 17

Fine—In imposing fine, regard is to be had to the means of the accused—1 Bur S R 483 Where a fine is not suited to the nature of the offence and is beyond the means of the offender to pay it, it ought not to be inflicted merely in order that a further period of imprisonment in default should be suffered—1895 P R 20

An order for payment of daily fine is illegal, in as much as it is an adjudication prospectively in respect of an offence which has not been committed—27 Cal 565 There must be proof of a continuing offence before the jurisdiction of a Magistrate to make such an order arises—24 All 309

Fine under other laws—Under this Code and the Penal Code a Magistrate has power only to inflict fine up to Rs 1000—7 W R 37 But if an offence under *any other law*, e.g. under sec 35 of the Companies Act, is proved, the Magistrate is bound to impose a fine of Rs 500 in respect of each offence of issuing an unstamped share certificate, and the fact that section 32 of this Code gives the Magistrate power to inflict only a fine of Rs 1000 will not curtail the Magistrate's jurisdiction to impose a fine of more than Rs 1000 in a case where more than two unstamped share certificates have been issued—20 Cal 676 So also under section 12 of the Opium Act, the Magistrate can impose any amount of fine in lieu of confiscation and his power is not limited by section 32 of this Code—2 P L T 63

Whipping—A second class Magistrate cannot pass a sentence of whipping under this Code, although he was empowered to do so under the old Code of 1872—7 Bom 303

A sentence of whipping is not appropriate in the case of a person holding a respectable position in life—1907 P W R 9

Whipping cannot be awarded in default of payment of fine—1866 P R 5, nor can fine be awarded in addition to whipping—6 C P L R 34

Rules for whipping—‘The Governor General in Council observes that the extent to which the punishment of whipping is inflicted in the several Provinces is a matter which should even during ordinary times when the circumstances of the country are normal be carefully watched by Local Governments and administrations in order that any tendency to or towards an indiscriminate or ill-judged resort to this form of punishment may be promptly checked This is especially necessary during times of scarcity, when, from causes more or less beyond their own control, the poorer classes of the population are driven to the commission of petty crimes The policy of largely resorting during times of agricultural distress, to whipping as a punishment for petty thefts and other offences of a similar nature, may, no doubt, be defended by the argument that it would be impossible at such times to provide accommodation for all

offenders in the jails. But if due and timely provision is made for employment of the industrious poor, there need be no excessive resort in punitive measures of this kind, and the Governor General in Council trusts that if such times should unfortunately recur, the matter will be watched with especial care by the Local Governments and Administrations concerned, and that it may be found possible to distinguish between those members of the criminal classes who take advantage of seasons of public trouble to prey upon their neighbours, and the honest labouring poor who are driven by sheer necessity to grain pilfering or similar offences. For the former, the punishment should be sharp and effective and whipping may often be most appropriate. The latter should be considerably dealt with, and put in the way of relief after such punishment of fine or moderate imprisonment as may seem to be appropriate in each case. — Proceedings of the Government of India, Home Department (Judicial) 11th January, 1887.

"The Judges of the Punjab Chief Court have invited the attention of the Criminal Courts to the following points — (1) that persons in respectable position of life should not ordinarily be whipped, (2) that the punishment should be inflicted only in case of false evidence, extortion and forgery under any exceptional circumstances, (3) that whipping, as an additional punishment, should only be ordered when a further deterrent appears to be really called for in the interests of justice, (4) that special care and judgment should be exercised in times of agricultural scarcity and distress. — Punjab Cir. LXXI, p. 280.

"Whipping, being a punishment which, to certain classes of the community, carries great disgrace with it, shall not be inflicted when there are special circumstances which render it undesirable or make it in reality a greater punishment than the law intends. More especially should this be borne in mind in cases where it is proposed to inflict whipping as the sole punishment, and where consequently either no appeal lies in law or there is often no practical appeal. *No man who, up to the time of his conviction, has occupied a position of some respectability should be subjected to this punishment*, which is meant rather for persons of the lowest classes who commit such petty thefts, etc., as are properly visited with whipping. Neither adults nor juveniles may be punished with whipping for an offence under a special Act, unless the Act contains a special provision to that end." — C. P. Cr. Cir., Part III, No. 3.

33 (1) The Court of any Magistrate may award

Power of Magistrates to sentence to imprisonment in default of fine

imprisonment in default of payment of fine as is authorized by law in case of

such default

Provided that—

Proviso as to certain cases

(a) the term is not in excess of the Magistrate's powers under this Code

(b) in any case decided by a Magistrate where imprisonment has been awarded as part of the substantive sentence, the period of imprisonment awarded in default of payment of the fine shall not exceed one fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine

(2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 32

Imprisonment not proportionate to fine—Imprisonment in default of payment of fine need not always be proportionate to the amount of the fine imposed—1 Bur S R 483

Sec 65 I P C—This section does not authorise a Magistrate to pass a sentence of imprisonment in default of payment of fine, in excess of the term prescribed by Sec 65 I P C—10 Mad 165, 10 Mad 166 (Note), overruling 1 Mad 277

Power of District Magistrate under sec 30—A District Magistrate specially empowered under sec 30 in trying a case under sec 471 I P C, can pass a sentence of one year and nine months (*i.e.*, one fourth of 7 years) in default of payment of fine—1885 P L 35

34 The Court of a Magistrate, specially empowered under section 30, may pass any sentence authorized by law, except a sentence of death or of transportation for a term exceeding seven years or of imprisonment for a term exceeding seven years

Higher powers of certain District Magistrates

Sentences which Courts and Magistrates may pass upon European British Subjects

34A Notwithstanding anything contained in sections 31, 32 and 34—

(a) no Court of Session shall pass on any European British subject any sentence other than a sentence of death, penal servitude, or imprisonment with or without fine, or of fine, and

(b) *no District Magistrate or other Magistrate of the first class shall pass on any European British subject any sentence other than imprisonment which may extend to two years, or fine which may extend to one thousand rupees or both*

This is only a roundabout way of saying that an European British subject shall not be punished with whipping or solitary confinement

This section has been added by the Criminal Law Amendment Act, XII of 1923. 'The Bill proposes that so far as sentences of death, penal servitude or imprisonment with or without fine or of fine only are concerned the powers of these officers shall be identical in the case of European British subjects and Indian British subjects except as regards Magistrates who have been specially empowered under section 30 of the Code. Such Magistrates will only be able to pass those sentences on European British subjects which could be passed by ordinary first class Magistrates. Such Magistrates will however have power to try European British subjects for the same additional offences as they are able to try Indian British subjects under their special powers.—Report of the Racial Distinctions Committee

35 (1) *When a person is convicted at one trial of two or*

Sentence in cases of conviction of several offences at one trial

more offences, the Court may subject to the provisions of section 71 of the Indian Penal Code sentence him, for such offences to the several punishments prescribed therefor which such Court is competent to inflict such punishments when consisting of imprisonment or transportation to commence the one after the expiration of the other in such order as the Court may direct unless the Court directs that such punishments shall run concurrently

(2) In the case of consecutive sentences it shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court

Maximum term of punishment Provided as follows —

(a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years

(b) if the case is tried by a Magistrate (other than a Magistrate acting under section 34), the aggregate punishment shall not exceed twice the amount of punishment which he is, in the exercise of his ordinary jurisdiction, competent to inflict

(3) For the purpose of appeal, *the aggregate of consecutive sentences* passed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence

Change — This section has been amended by the Criminal Procedure Code Amendment Act, XVIII of 1923. Before the amendment subsection (1) stood thus — ‘When a person is convicted at one trial of two or more *distinct* offences, the Court may sentence him for such offences’ etc. In subsection (3) the words ‘aggregate of consecutive’ have been substituted for the word ‘aggregate’, and the *Explanation* and *Illustration* have been omitted.

‘The existing Explanation and Illustration to section 35 have occasioned considerable misunderstanding. It is therefore proposed to omit them and state definitely that section 35 must be read subject to section 71 I P C. It is also declared that aggregate sentences passed under section 35 in case of conviction for several offences at one trial shall be deemed to be a single sentence for the purpose of appeal, if they run consecutively’ — *Statement of Objects and Reasons* (Bill 3 of 1914)

Section 71 I P C — Section 71 of the Indian Penal Code provides as follows —

‘Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such offences, unless it be so expressly provided

‘Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

the offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences

In all other cases (e.g. where the offences are distinct, or where there is a repetition of the same offence), the Court can pass separate sentence for each of the offences, under section 35 of the Cr. P. Code

Scope of Section —‘Convicted’—This section applies only to convictions of offences; it does not apply to imprisonments under sec. 123 of the Code—5 Bom. L. R. 26

Therefore, it is illegal for a Magistrate to direct that a sentence of imprisonment for an offence should take effect after the expiry of the sentence which the accused may be undergoing for default of finding security for good behaviour—16 Cr. L. J. 622 (Mad.). The order is also illegal under sec. 120

This section is not restricted to cases where the several punishments are all of the same kind & all are sentences of imprisonment or all are sentences of transportation. It covers cases of the description where one of the punishments is imprisonment while the other is transportation—23 C. L. J. 596—21 C. W. N. 608

One trial—This section has reference only to the conviction of an accused person of two or more offences at *one* trial. It does not apply to sentences passed at different trials—7 W. R. 1, 1886 P. R. 14, 3 All. 305, 1 A. W. N. 23, 20 C. W. N. 1300. Thus it does not include the case of *separate* trials held on the same day for separate offences committed by the same accused—2 Weir. 30

Distinct offences—By reason of the omission of the word ‘distinct’ the present section applies to all cases whether the offences are distinct or not. In all cases, the Court will be competent to inflict an aggregate of punishment in excess of the punishment which it is ordinarily competent to inflict in respect of a single offence.

Owing to this change in the law, the rulings in 8 Bom. L. R. 850 and 13 C. P. L. R. 124 are overruled. In these cases it was held that if the offences were not distinct, the trying Magistrate’s ordinary jurisdiction was not enhanced by the provisions of sub section (2) and proviso (b)

May sentence—The words ‘*may* sentence’ do not mean that the Court *must* necessarily pass distinct sentences—Ratanlal 597 (*per Jardine* J). The use of the word *may* shows that this section only permits and does not make it obligatory on Courts to pass separate sentences in one trial—L. B. R. (1900–1902) 33, 1 B. R. (1872–1892) 271; 1 Bur. S. R. 271

But though it is not illegal to pass one sentence for all the offences, still it is generally the proper course to pass a separate sentence for each offence—Ratanlal 597, 4 M. H. C. R. App. 27, because such a course will enable the Appellate Court to know the punishment to be remitted, in case the conviction for one of the offences is set aside—4 M. H. C. R. App. 27. If one aggregate sentence is imposed for all the offences, it is impossible to apportion it to the different offences of which the accused is convicted—1886 P. R. 14

On the other hand, if the offences are not separate (*e g* offences under secs 392 and 75 I P. C) the awarding of two separate sentences is illegal—18 M L T 121

Consecutive sentences —If separate sentences are passed for each offence of which an accused stands convicted, the sentence must commence one after the expiry of the other—L B R (1872—1892) 526 Where a man is imprisoned under two warrants, ordering consecutive sentences the first should be completely executed both in regard to the substantive term of imprisonment as well as the imprisonment in default of fine, before any effect is given to the second warrant—Ratanlal 132

Concurrent sentences —The Court must expressly direct whether the sentences are to run concurrently or consecutively Omission to determine whether the sentences of imprisonment and transportation (in a case where both sentences have been passed) are to run concurrently or consecutively makes the sentence defective in form—23 C L J 596= 21 C W N 608

The only cases in which a Court may pass concurrent sentences for two offences are when the accused is convicted at the *same trial* for both the offences, if the trials are separate sec 397 applies, and the sentences must take effect consecutively—2 S L R 23, 20 C W N 1300, 22 C W N 597, 19 A L J 310 15 C P L R 57, 16 O C 370 11 A L J 263, 6 Bur L T 67 21 Cr L J 398 (All) But when a prisoner was tried on the same day separately for two offences for which he could have been tried at one and the same trial, an order passing concurrent sentences was held to be not illegal, as the two trials were for all practical purposes to be treated as one—13 Bom L R 200

It is not illegal to direct a sentence of imprisonment to run concurrently with a sentence of transportation—1913 P R 21

The imprisonment referred to in this section is a substantive sentence of imprisonment, an order directing that terms of imprisonment in default of payment of fine shall run concurrently is illegal—5 S L R 263

Appeal —An accused who has been sentenced to concurrent sentences of imprisonment, no one of which is individually appealable, has no right to aggregate them and appeal against them collectively—40 Cal 631, 25 C W N 613, 17 C I J 392 [Contra—17 C W N 72 and 15 C W N 734 where it was held that concurrent sentences must be aggregated for purposes of appeal as otherwise there would be no distinction between a concurrent sentence and a single sentence in which no sentence was passed under the second charge But these rulings can no longer stand as good law in view of the recent amendment made in subsection (3) under which only *consecutive* sentences can be aggregated for the purpose of appeal]

Proviso (a) —The proviso does not import that any aggregate punishment within these limits could be imposed by a *single* sentence instead of separate sentences—1886 P R 14 Fourteen years is the maximum term of imprisonment which can be awarded as an aggregate sentence—7 C P L R 29

Sentences of imprisonment may be accumulated beyond 14 years in more than one trial The limit of 14 years has reference only to sentences passed simultaneously at one trial or passed on charges tried simultaneously—7 W R 1

Proviso (b) —Where there are separate trials the Magistrate's power of punishment is not limited to twice the amount which he is competent to pass—3 All 305 1 Bur S R 271

Before the present amendment it was held that if the offences were not *distinct* the trying Magistrate's ordinary jurisdiction was not enhanced by this proviso—8 Bom L R 850 This is no longer good law See *supra*

Sub section (3) —For the purposes of appeal —It is only for the purposes of appeal (and for no other purpose e.g. for the purpose of commutation into transportation) that the consecutive sentences can be treated as one sentence therefore two or more offences cannot be added up so that the aggregate period may be commuted into transportation—7 W R 1

For the purposes of appeal only consecutive sentences are allowed to be taken in the aggregate as one sentence This sub section does not apply to concurrent sentences—U B R (1897 1901) 13 L B R (1900 1902) 57, 1901 P R 25 See notes under 'Appeal' above

Only substantive sentences can be aggregated under this section, a sentence of imprisonment in default of payment of fine must not be included for the purposes of calculation—1892 P R 22

Splitting up of offences —No Magistrate is entitled to split up an offence into its component parts for the purpose of giving himself summary jurisdiction, thereby depriving the prisoner of the right of appeal—4 Cal 18

C—Ordinary and Additional Powers

36 All District Magistrates Sub divisional Magistrates

Ordinary powers of Magistrates and Magistrates of the first, second and third classes have the powers hereinafter respectively conferred upon them and specified in the third schedule Such powers are called their 'ordinary powers.'

On the other hand, if the offences are not separate (*e g* offences under secs 392 and 75 I P. C) the awarding of two separate sentences is illegal—18 M L T 121

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PART III.

GENERAL PROVISIONS

CHAPTER IV.

OF AID AND INFORMATION TO THE MAGISTRATES, THE POLICE AND PERSONS MAKING ARRESTS

42 Every person is bound to assist a Magistrate or police-officer reasonably demanding his aid, whether within or without the presidency-towns,—

Public when to assist
Magistrates and police

- (a) in the taking or preventing the escape of any other person whom such Magistrate or police-officer is authorized to arrest ;
- (b) in the prevention or suppression of a breach of the peace, or in the prevention of any injury attempted to be committed to any railway, canal, telegraph or public property.

‘Every person’ —A Police officer charged with the duty of arresting an accused can ask a chowkidar to assist him in arresting the accused or in preventing his escape—6 C. W. N. 337.

‘Reasonably’ —No person is bound to obey an *unreasonable* order of a Magistrate or Police officer. Thus, where a Magistrate ordered a landholder to find a clue to a theft within 15 days, it was held that such an order was unreasonable and unwarranted by this section, and the landlord was not bound to perform an act for which the police are appointed and paid. Disobedience by the landlord of such order is no offence—3 All 201. Members of the public are bound to assist a police officer reasonably demanding their aid to the taking of any dacoits or suspected dacoits whom that officer is authorised by law to arrest. The law however does not intend that the police officers should have a general power of calling upon the members of the public to join them in arresting a number of unknown persons whose whereabouts are not known. Refusal to assist the police officer in such a quest is not an offence—42 All 314.

41. (1) The Local Government may withdraw all or
Powers may be cancelled. any of the powers conferred under
this Code on any person by it or
by any officer subordinate to it.

(2) Any powers conferred by the District Magistrate may
be withdrawn by the District Magistrate.

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Aid.—The aid that can be demanded under this section is the personal assistance of the person of whom it is demanded, and not the supply of a contingent of men to assist—2 Weir 37

Punishment —Omission to assist under this section is punishable under Sec 187 I P. C

43. When a warrant is directed to a person other than a police-officer, any other person may aid in the execution of such warrant, if the person to whom the warrant is directed be near at hand and acting in the execution of the warrant.

44 (1) Every person, whether within or without the presidency-towns aware of the commission of, or of the intention of any other person to commit any offence punishable under any of the following sections of the Indian Penal Code (namely), 121, 121A, 122, 123, 124, 124A, 125, 126, 130, 143, 144, 145, 147, 148, 302, 303, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 456, 457, 458, 459 and 460, shall, in the absence of reasonable excuse, the burden of proving which shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police-officer of such commission or intention.

(2) For the purposes of this section the term "offence" includes any act committed at any place out of British India which would constitute an offence if committed in British India.

Information sent through chowkidar —Where one of several lambardars to the knowledge of others, directs the chowkidar to report a burglary at the thana, the requirements of this section have been complied with, and the lambardar cannot be said to have failed to give information if the chowkidar omits to report it at the thana—1889 P. R 5

No duty after information —When once the information of a crime reaches the police, the object of this Section has been fulfilled, and no further duty imposed by it remains—Ratanlal 674

Punishment —Omission to give information under this Section is punishable under Secs 119, 176 and 207 I P C For false information, see Sec 177 I. P C

45 (r) Every village headman, village-accountant, village-watchman, village police-officer, owner or occupier of land, and the agent of any such owner or occupier *in charge of the management of that land* and every

Village-headmen accountants, landholders and others bound to report certain matters

officer employed in the collection of revenue or rent of land on the part of Government or the Court of Wards, shall forthwith communicate to the nearest Magistrate or to the officer in charge of the nearest police-station, whichever is the nearer, any information which he may *possess* respecting—

- (a) the permanent or temporary residence of any notorious receiver or vendor of stolen property in any village of which he is headman, accountant, watchman or police-officer, or in which he owns or occupies land, or is agent, or collects revenue or rent ;
- (b) the resort to any place within, or the passage through, such village of any person whom he knows, or reasonably suspects, to be a thug, robber, escaped convict or proclaimed offender ;
- (c) the commission of, or intention to commit, in or near such village any non bailable offence or any offence punishable under section 143, 144, 145, 147, or 148 of the Indian Penal Code ,
- (d) the occurrence in or near such village of any sudden or unnatural death or of any death under suspicious circumstances , *or the discovery in or near such village of any corpse, or part of a corpse in circumstances which lead to a reasonable suspicion that such a death has occurred, or the disappearance from such village of any person in circumstances which lead to a reasonable suspicion that a non-bailable offence has been committed in respect of such person*
- (e) the commission of, or intention to commit, at any place out of British India near such village, any act

which, if committed in British India, would be an offence punishable under any of the following sections of the Indian Penal Code, namely, 231, 232, 233, 234, 235, 236, 237, 238, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459, 460, 489A, 489B, 489C, and 489D ;

(f) any matter likely to affect the maintenance of order or the prevention of crimes or the safety of person or property respecting which the District Magistrate, by general or special order made with the previous sanction of the Local Government, has directed him to communicate information.

(2) In this section—

(i) "village" includes village-lands ; and

(ii) the expression "proclaimed offender" includes any person proclaimed as an offender by any Court or authority established or continued by the Governor-General in Council in any part of India, in respect of any act which, if committed in British India, would be punishable under any of the following sections of the Indian Penal Code, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459, and 460.

(3) Subject to rules in this behalf to be made by the

Appointment of village-headman by District Magistrate in certain cases for purposes of this section.

Local Government, the District Magistrate or *Sub divisional Magistrate* may from time to time appoint one or more persons *with his or their consent to perform the duties of a village headman under this section whether a village-headman has or has not been appointed for that village under any other law.*

Change .—The italicised words show the amendments made by the Criminal Procedure Code Amendment Act, XVIII of 1923

Object of Section .—The provisions of this Section are not to be worked solely for the purpose of vexation, but for the purpose of

ensuring that information be not intentionally withheld by persons whose position renders them liable to give it. Therefore where information is given to the nearest Magistrate or Police by one of the persons bound to give such information, it is not reasonable that every other person bound to give information should be prosecuted for not having done so—4 Cal 613, 7 Mal 436, 20 Cal 316, Ratanlal 778. Where the police are already informed of a fact, there is no obligation to repeat the information—23 Cr L J 162 (Oadh)

Persons bound — *Village headman* in Madras means a Village Munsiff or Village Magistrate—32 Mad 258. A *Zulder* is not a village headman within the meaning of this Section—1894 P R 25, 1886 P R 19.

A *Village Accountant* was not bound under the corresponding section of the Code of 1872—1 Mal 265 but now he is expressly mentioned.

The owner or occupier of a house in a village is not the 'owner or occupier of land'—12 Mad 92, 2 Weir 38. Residence in a dwelling house belonging to another is not occupation of land—23 W R 60.

Every *mukaddam* and *Kotwar* is bound to give information under this section—23 Cr L J 345 (Nag), see also 7 N L R 101.

Owner and agent — The liability of the resident agent arises when the owner is not resident and has no personal knowledge of the fact to be reported. Where the owner has such knowledge, the liability certainly attaches to the owner—23 W R 60. Under the present law, the agent is liable only if he is in charge of the management of the land.

A *khazanchi* of a *Zemindar* of a village is not an agent. A *dewan* may be an agent during the absence of his master, but not a *dewan* who acts only under the orders of his *resident* master—4 Cal 603.

Forthwith — The word 'forthwith' must be construed with reference to the object of the enactment. Where a *kulkarni* gave information of a suspicious death some 7 or 8 hours after he was aware of the same, the information was not given forthwith—Ratanlal 784.

Information — The persons enumerated in this section are bound to report an information, and not a mere rumour. Where the *Zemindar* heard of the disappearance of a man from the village and a rumour that he had been murdered, the omission to report such rumour to the police is not an offence—70 A W N 207.

The Information to be given to the police is the information of the commission of an offence. An information that a certain jewel is missing is not an information that an offence has been committed and need not be communicated to the police—5 M L T 257.

If the offence is a bailable one, the persons enumerated in this section are not bound to give information of it—1887 P R 30, 32 Mad 258

“Possess” —This word has been substituted for the word ‘obtain’ The reason is that it is unfair and unjust to compel the village officers to *obtain* the information specified in this section See the Debates of the Legislative Assembly, January 16, 1923

Clause (b)—*Resort to or passage through* —The bringing of a suspected robber under arrest to the village and releasing him there does not amount to the resorting to or the passage through the village of a suspected robber—1887 P R 31

Proclaimed offender —These words include persons over and above those to whom the words in their ordinary sense apply—21 A W N to The fact that the offender’s property has been attached and sold under the provisions of sec 88 of this Code does not raise any presumption that he is a proclaimed offender It is on the prosecution to prove that the proclamation was made in the manner prescribed by sec 87 of this Code—7 Mad 436

Clause (d)—*Occurrence of death* —The duty imposed by this section on a village headman etc of giving information as to the occurrence of any sudden or unnatural death is intended to apply only when the death takes place at or near the village of which he is the headman, owner, occupier etc—23 W R 60

If a body is found on one’s land, the presumption is that the death took place there, and the owner is under an obligation to give information regarding the matter—11 Cal 619 (Mitter J dissenting, held in this case that there could be no such presumption, it could be equally presumed that the death took place in another village, and the dead body was thence removed to this village) Under clause (d) as now amended the finding of a corpse must be reported, without reference to the question of presumption as to whether the death took place in the same village or in another village

If a dead body is found in a stream it is enough to give rise to a presumption that the death took place under suspicious circumstances and the person finding it is bound to report it under this section—1887 P R 70

Punishment —For omission to give information under this section see Sec 176 I I C If an omission to give information by persons not enumerated in this section is not an offence—1892 P R 34

If the information —A person giving a false information of an offence to a village Magistrate who is bound to pass the information on to the higher authorities under this section will be guilty of an offence under

Sec 211 I. P. C—32 Mad 258 It would be otherwise if the offence complained of is one in regard to which the information need not under this section be passed to the higher authorities—*Ibid*

Proof—To support a conviction for omitting to give information under this section, it should be proved that the accused bears the character which raises the obligation under this section—1 Mad 266, it must be proved that a specified offence has been committed by some one, that the accused knew of its having been committed, and that he wilfully omitted to give the information—22 W R 42

Sub section (3)—*Appointment of village headmen*—An order of a District Magistrate dismissing a person from the office of a headman of a village under rules framed under this sub section is an executive order and is not subject to revision by the High Court—19 All 563

Bengal rules for the appointment of headmen—

(1) In all villages in which Bengal Act VI of 1870 has been introduced, the Magistrate of the District may appoint the principal member of the Chowkidari Panchayat or the collecting member, where there is one, to be village headman

(2) In villages where Bengal Act VI of 1870 has not been introduced, the Magistrate of the District, may appoint the principal resident agent of land owner, or rent receiver or his representative or the principal resident cultivator to be village headman

(3) In the case of a principal or collecting member of a Chowkidari Panchayat, a clause shall be added to the appointment under Sec 3 of the Chowkidari Act to the effect that he has also been appointed to be village headman under Sec 45 of the Criminal Procedure Code When a person other than a member of a Chowkidari Panchayat is appointed he shall receive a special *Sanad* from the Magistrate

(4) The Magistrate shall keep a register of all persons who have been appointed village headmen showing their names and father's names and the village for which they are responsible and shall take measures to effect mutations in that register from time to time when one headman dies and is succeeded by another—Calcutta Gazette 26 12 1893

CHAPTER V

OF ARREST, ESCAPE AND RETAKING

A—Arrest generally

46 (1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action

Arrest how made

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police-officer or other person may use all means necessary to effect the arrest

Resisting endeavour to arrest

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with transportation for life

Warrant—When a warrant of arrest has been issued, the officer making the arrest must have the warrant in his possession otherwise it is illegal—5 All 318

Illegal arrests—*Right of private defence*—Where the act of a public servant is entirely *ultra vires*, the right of private defence may be exercised against him—13 Bom 168, 16 C W N 549

"All means"—*Justifiable violence*—The means employed to stop the fugitive should be such as an ordinary prudent man would make use of, who had no intention of doing any serious injury The wounding of a thief by a Chowkidar in order to his arrest was held to be justifiable under the circumstances—2 W R 9

Punishment for resistance to arrest—see secs 224 225 225B, 1 P C

47 If any person acting under a warrant of arrest, or any police officer having authority to arrest, has reason to believe that the person to be arrested has entered into, or is within, any place, the person residing in, or being in charge of, such place, shall on demand of such person acting as aforesaid or such police-

Search of place entered by person sought to be arrested

officer, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

Scope —This section is not intended to restrict the powers of the Police to enter the place to be searched. On the contrary, it is a provision compelling householders to afford the police facilities in carrying out their duties, and the next section provides that if difficulties are placed in the way of a Police officer he may use force to obtain ingress—41 Cal 350

Demand —No precise words are needed, it is enough to give notice that entry is sought under proper authority. Russell on Crimes, p. 745.

48 If ingress to such place cannot be obtained under section 47 it shall be lawful in any case Procedure where ingress not obtainable for a person acting under a warrant and in any case in which a warrant may issue, but cannot be obtained without affording the person to be arrested an opportunity of escape, for a police officer to enter such place and search therein, and in order to effect an entrance into such place, to break open any outer or inner door or window of any house or place, whether that of the person to be arrested or of any other person, if after notification of his authority and purpose, and demand of admittance duly made, he cannot otherwise obtain admittance

Breaking open Provided that, if any such place is an apartment in the actual occupancy of a woman (not being the person to be arrested) who, according to custom, does not appear in public, such person or police-officer shall, before entering such apartment, give notice to such woman that she is at liberty to withdraw and shall afford her every reasonable facility for withdrawing, and may then break open the apartment and enter it

A police officer entering into a building for the purpose of arresting suspected persons will not be liable for trespass—36 Cal 433

49 Any police officer or other person authorized to make an arrest may break open any Power to break open doors and windows for purposes of liberation outer or inner door or window of any

house or place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein.

50. The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.

No unnecessary restraint.

For punishment for unnecessary restraint, see section 220, I. P. C

51. Whenever a person is arrested by a police-officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail but the person arrested cannot furnish bail, and

Search of arrested persons.

(whenever a person is arrested without warrant, or by a private person under a warrant, and cannot legally be admitted to bail, or is unable to furnish bail,

the officer making the arrest or, when the arrest is made by a private person, the police-officer to whom he makes over the person arrested, may search such person, and place in safe custody all articles, other than necessary wearing-apparel, found upon him.

52 Whenever it is necessary to cause a woman to be searched, the search shall be made by another woman, with strict regard to decency.

Mode of searching women.

53 The officer or other person making any arrest under this Code may take from the person arrested any offensive weapons which he has about his person, and shall deliver all weapons so taken to the Court or officer before which or whom the officer or person making the arrest is required by this Code to produce the person arrested.

Power to seize offensive weapons.

B.—Arrest without Warrant.

54 (1) Any police-officer may, without an order from a Magistrate and without a warrant, arrest—

When police may arrest without warrant.

- first*, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists of having been so concerned ;
- secondly*, any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking ,
- thirdly*, any person who has been proclaimed as an offender either under this Code or by order of the Local Government ,
- fourthly*, any person in whose possession anything is found which may reasonably be suspected to be stolen property, *and* who may reasonably be suspected of having committed an offence with reference to such thing ,
- fifthly*, any person who obstructs a police-officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody ,
- sixthly*, any person reasonably suspected of being a deserter from Her Majesty's Army or Navy or of belonging to Her Majesty's Indian Marine Service and being illegally absent from that service ,
- seventhly*, any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of having been concerned in, any act committed at any place out of British India, which, if committed in British India, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in British India , and

eightly, any released convict committing a breach of any rule made under section 565, sub-section (3)

ninthly, any person for whose arrest a requisition has been received from another police-officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition

(2) This section applies also to the police in the town of Calcutta

Change —In clause 4, the word 'and' has been substituted for the word 'or', and clause 9 has been newly added, by the Criminal Procedure Code Amendment Act, XVIII of 1923. For reasons, see below

Any Police officer —Village Chowkidars are not Police officers within the meaning of this section—27 Cal 366 3 All 60 35 Cal 361, 41 Cal 17

The words 'any police officer' show that where a warrant has been issued for the arrest of certain culprits on a charge of a cognizable offence, any police officer, even though not entrusted with the execution of such warrant, will be justified under this section in making the arrest—40 Mad 1028

Power of arrest —The words 'may arrest' show that the power of arrest is discretionary. A Police officer is not always bound to arrest for cognisable offences. If a complaint of such an offence is made to him, he ought, if there be circumstances in the case which lead him to suspect the information to refrain from arresting persons of respectable position and to leave the complainant to go to a Magistrate and convince him that the information justifies the serious step of the issue of a warrant of arrest—Ratanlal 795

Again, the powers under this section must be cautiously used. This section gives wide powers to a Police officer to make an arrest without an order from the Magistrate and without warrant only in certain circumstances limited by the provisions contained in this section and it is necessary in exercising such large powers to be cautious and circumspect—20 C W N 1235

Lawful arrest —Where a person was arrested by a police man under a lawful belief that such person was in possession of stolen property, the policeman was held to be protected under the circum-

tances, though the property was not stolen property—12 Bom. 377. But where a police officer, seeing a horse like the one lost by his father tied up in a person's barn, seized it and arrested the person for theft, without making further enquiries, it was held that he was not protected, as his act was not done in good faith—to W. R. 20.

Sending private persons —Where a police officer, instead of arresting the person himself, sends some of his neighbours to make the arrest, the person arrested is in law in his custody, and the police officer is responsible in the same way as if he had made the arrest himself—7 W. R. 7. But resistance to such private persons making the arrest is not an offence under Sec. 225 I P C—5 L. B. R. 21.

Power to detain —Authority given to arrest under this section implies authority to detain—Ratanlal 220.

Punishment —A police officer arresting a person unjustifiably or otherwise than on a reasonable ground is guilty of an offence under Sec. 220, I P Code.

A person causing obstruction to a Police officer making an arrest under this section, is guilty of an offence under section 225 I P. C.—40 Mad. 1028.

Clause (1)—Reasonable complaint or suspicion —What is a reasonable complaint or suspicion must depend on the circumstances of each particular case, but it must be at least founded on some definite fact tending to throw suspicion on the persons arrested, and not a mere vague surmise or information. Still less have the police any power to arrest persons, as they sometimes appear to do, merely on the chance of something being hereafter proved against them—7 W. R. 3.

A general definition of what constitutes *reasonableness* in a complaint or suspicion and *credibility* of information cannot be given. Both must depend upon the existence of tangible legal evidence within the cognisance of the Police officer, and he must judge whether the evidence is sufficient to establish the reasonableness and credibility of the charge, information or suspicion—Reg. and Ord. N. W. P., Sec. 10, para 366 (8).

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The 'reasonable suspicion' and 'credible information' in this section must be based upon definite facts which the Police officer must consider for himself before he acts under this section. He cannot delegate his discretion or take shelter under another person's belief or judgment. Any other interpretation of these words would tend to diminish the sense of responsibility of the officers concerned, and to make the exercise of their powers dangerous—44 Cal 76, 20 C W N. 1233. Thus, where a Police officer arrested the accused on receipt of a letter written by an Inspector of Police in which it was stated that the accused committed

offences under secs. 409 and 420 I. P. C. and it appeared that the officer effecting the arrest relied solely on the aforesaid letter and had no personal knowledge of the facts of the case, it was held that the arrest of the accused was not proper—20 C. W. N. 1233 (But now see clause 9). But if a Magistrate after taking the statement of the complainant respecting an offence under section 406 I. P. Code, issues a warrant for the arrest of the accused, there is a 'reasonable complaint' of the accused being concerned in a cognizable offence; consequently a constable who arrests the accused without a warrant is justified in doing so under this section—22 Cr. L. J. 758 (All)

Clause (4).—A formal complaint need not be made, in order to authorise a police officer to arrest under this clause any person found with stolen property—S W. R. 28

The possession of stolen property must be recent and exclusive—*Ibid.*

The word 'and' has been substituted for 'or'. Under the old law as it stood before 1923, a police officer could arrest any person in whose possession anything was found which might reasonably be suspected to be stolen property *or* who might reasonably be suspected of having committed an offence with reference to such a thing. The effect of the amendment is that the mere possession of stolen property will not entitle a police officer to arrest the person in possession of it but the person must also be reasonably suspected of having committed an offence in respect of the thing. See the Debates of the Legislative Assembly, dated 16th January, 1923

Reasonably suspected.—This clause refers only to property which is reasonably suspected to have been stolen, and not to anything which a police officer may choose to imagine has been stolen—10 W. R. 20

Bona fide belief.—See 12 Bom. 377 cited above.

Clause (7).—*Offence committed out of British India*.—By virtue of this clause, 19 Bom. 72 is no longer good law—7 Bom. L. R. 463. This clause authorises the police in British India to arrest without warrant a British subject committing outside British India any of the offences enumerated in the first Schedule of the Extradition Act—*Ibid.*

An arrest in British India by a police of the Native State of a person suspected to have committed an offence in the Native State is illegal—29 All. 377

Clause (11).—The first two lines of this clause have been added on the recommendation of the Select Committee which sat on the Bill in 1916, and the latter portion on the recommendation of the Joint Committee in 1922. 'The Committee are of opinion that an amendment is required in section 54 to meet the case of a requisition from a police officer to arrest a man at a distance. We think it is clear that there should be

power for an investigating officer to require by telegram the arrest of a person who may, perhaps, have absconded from the place where the investigation was taking place. We, therefore, propose to add a clause at the end of section 54"—*Report of the Select Committee of 1916* "We agree with those critics who desire that some safeguard should be provided and we have therefore proposed to lay down that the requisition should reveal the offence or other cause for which the arrest is to be made, so that the arresting officer can satisfy himself that the arrest could lawfully have been made without warrant by the officer issuing the requisition"—*Report of the Joint Committee (1922)*

Arrest without warrant under Special Acts :—Arrest of person in possession of contraband salt (S-c 24, Madras Act VII of 1864, Sec 4 of Madras Act I of 1887), carrying arms under suspicious circumstances (Sec 12, Arms Act XI of 1878), gambling in open streets (Sec 13 of Act III of 1867), committing offences under the Railways Act (Sec 132, Railways Act), Cantonments Act (Sec 15 of Act XIII of 1869), the Criminal Tribes Act (Secs 20 and 26 of Act XXVII of 1871) Sec 12 of the Emigration Act XXI of 1883 Sec 13 of Indian Explosives Act IV of 1884, Forest Act (Sec 63 of Act VII of 1878), European Vagrancy Act (Sec 19 of Act I of 1874), Assam Labour and Emigration Act (VI of 1901, section 193), Bengal Excise Act (VII of 1878, secs 40 and 41), Cruelty to Animals Act (Bengal Act III of 1869, section 1), Punjab Municipal Act (XX of 1891, secs 18, 83), Bombay Gambling Act (IV of 1867, sec. 12A), Rangoon Tramways Act (XXII of 1883, sec 19)

55 (1) Any officer in charge of a police-station may, in like manner, arrest or cause to be arrested—

Arrest of vagabonds,
habitual robbers, etc

- (a) any person found taking precautions to conceal his presence within the limits of such station, under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence, or
- (b) any person within the limits of such station who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself, or
- (c) any person who is by repute an habitual robber, house-breaker or thief, or an habitual receiver of stolen property knowing it to be stolen, or who by repute habitually commits extortion or in order to

the committing of extortion habitually puts or attempts to put persons in fear of injury.

(2) This section applies also to the police in the town of Calcutta

Object of section —The powers with which officers in charge of police station have been armed under the Code for the purpose of restraining bad characters are exceptional powers. They provide very strong remedies and should never be put in force without the greatest deliberation, and except upon convincing evidence. This section was intended for the suppression of habitual bad characters whom an officer in charge of a Police station suddenly finds within his jurisdiction or about whom he has good cause to fear that they will commit serious harm, before there is time to apply to the nearest Magistrate empowered to deal with the case under sec 112 of this Code—14 All 45

Illegal arrests —A person against whom proceedings under Chapter VIII were held by the High Court to be illegal, was re-arrested under this section after giving him ostensible release. It was held that the re-arrest was illegal and unlawful exercise of authority, as it was an attempt in another way to do what had been declared by the High Court to be illegal—3 A W N 223. Similarly, where the Sessions Judge has passed orders for the immediate release of an accused person, the action of a Police officer or a Magistrate in further detaining him and subsequently taking proceedings against him is a grave irregularity and wholly without jurisdiction—41 All 483

Section applies to Calcutta Police —This section is expressly made applicable to the Police of Calcutta. Therefore, an officer in charge of a Police station in Calcutta may arrest a person, although there is no declaration by Government declaring a thana or police station in Calcutta to be a police station within the meaning of this Code—31 Cal 537

Bail —When the Police arrest under this section they are bound to give the person arrested the option of bail, and the bond should not be excessive, but in accordance with the position in life occupied by the person arrested—14 All. 45

Clause (a) —The person must be voluntarily within the limits of the Police station—3 A. W. N 223.

Habitual gambler —Only the persons enumerated here can be arrested under this section. Persons who are suspected to earn their livelihood by unlawful gambling are not liable to arrest by the Police. The proper course is to proceed under Sec 112 of the Code—31 B R

Lunatics —Dangerous and wandering lunatics are to be apprehended and sent to the Magistrate under sec 4 of Act XXVI of 1858

Vagrants —See Sec 19 of European Vagrancy Act IX of 1874

Sections 55 and 110 —This section is independent of Chapter VIII of this Code, although proceedings under that Chapter might follow on arrest under this section as a natural sequence. A police officer can therefore arrest or cause to be arrested without a warrant or an order of a Magistrate any person who is by repute a robber, house breaker or thief or otherwise comes under section 110 of the Code—35 All 407

56 (1) When any officer in charge of a police-station
or any police-officer making an investigation under Chapter XIV requires any officer subordinate to him to arrest without a warrant (otherwise than in his presence) any person who may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing, specifying the person to be arrested and the offence or other cause for which the arrest is to be made

Procedure when
 police-officer deputes
 subordinate to arrest
 without warrant

The officer so required shall before making the arrest notify to the person to be arrested the substance of the order and, if so required by such person, shall show him the order

(2) This section applies also to the police in the town of Calcutta.

Change —The italicised words have been added by sec 11 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

"We consider that a Police officer making an investigation should, no less than an officer in charge of a police station, have power to depute a subordinate to effect an arrest under the provisions of section 56 (1) and we propose an amendment in this subsection accordingly —*Report of the Select Committee of 1916*

The second para of subsection (1) did not exist in either of the Bills of 1914 or 1921, but was added on the motion of Mr Rangachariar (M L A.) during the debate in the Assembly. See the Debates of the Legislative Assembly, January 17, 1923

'Officer subordinate' —A chowkidar is an officer subordinate to an officer in charge of a police station—10 C W N 287

In his presence —If the arrest is made in the presence of the officer in charge of the Police station, the arrest is virtually made by him, and

no order in writing is necessary, a verbal order is sufficient—11 W R. 20

Order in writing —The order in writing is an authority to a subordinate officer to make an arrest which the superior Police officer, if present, could himself make on his own responsibility—27 Cal. 320

The mere writing of the name of the subordinate on the back of the warrant and the signing of that endorsement by the officer in charge of the station does not constitute an order in writing. But adding the words "arrest the person within named and for the offence within stated" would make it a valid order in writing—18 All. 246.

Section 80 of the Code applies only to warrants and not to orders in writing mentioned in this section, therefore a subordinate officer making an arrest under an order in writing is not bound to show the person arrested the authority under which he is acting; but it is desirable and even obligatory that if called upon, he should do so—27 Cal. 320 The recent amendment of the section now expressly makes it obligatory on the subordinate officer to notify to the person arrested the substance of the order in writing, and to show him the order if called upon to do so

Warrant by a Magistrate —The issuing of a warrant by a Magistrate for the arrest of a person does not exclude the jurisdiction of the officer in charge of the Police station and prevent him from issuing the order under this section. It might be different if the Magistrate has decided that no warrant should issue and that summons only should issue—18 All. 246

57. (1) When any person who in the presence of a police-officer has committed or has been accused of committing a non-cognizable offence refuses, on demand of such officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained

(2) When the true name and residence of such person have been ascertained, he shall be released on his executing a bond, with or without sureties, to appear before a Magistrate if so required

Provided that, if such person is not resident in British India, the bond shall be secured by a surety or sureties resident in British India

Refusal to give name and residence.

(3) Should the true name and residence of such person not be ascertained within twenty-four hours from the time of arrest or should he fail to execute the bond, or, if so required, to furnish sufficient sureties, he shall forthwith be forwarded to the nearest Magistrate having jurisdiction.

Refusal to give name and address—A Police constable asked a man not to create any disturbance on the public road. Upon the man's declining to do so, the constable demanded his name and address, which were not given. Then the constable arrested and dragged him to the police chowky and detained him there till his name and address were ascertained. It was held that the constable had lawfully exercised the powers conferred by this section—5 Bom L R 597.

58. A police-officer may, for the purpose of arresting without warrant any person whom he is authorized to arrest under this Chapter, pursue such person into any place in British India

Pursuit of offenders into other jurisdictions

Arrest in foreign territory—The arrest of a person at the Gwalior Railway station on a charge of an offence committed in British India is illegal. The British Government has no jurisdiction in such area in respect of offences not connected with the railway—I Lh 406. But the Police may in *hot pursuit* follow an offender into an independent Native State, if they arrest him there they must take him at once to the nearest Police authority of that State, if not in hot pursuit, they should ordinarily apply to the nearest Police authorities of the State and request them to effect the arrest of the fugitive—C P Pol Man. p 170

59. (1) *Any private person may arrest any person who in his view commits a non-bailable and cognizable offence, or any proclaimed offender, and, without unnecessary delay, shall make over any person so arrested to a police-officer, or, in the absence of a police-officer, take such person or cause him to be taken in custody to the nearest police-station*

Arrest by private persons. Procedure on such arrest.

(2) If there is reason to believe that such person comes under the provisions of section 54, a police-officer shall re-arrest him.

(3) If there is reason to believe that he has committed a non-cognizable offence, and he refuses on the

demand of a police-officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of section 57. If there is no sufficient reason to believe that he has committed any offence he shall be at once released.

Change —Subsection (1) has been re drafted and the words 'or cause him to be taken in custody have been added by sec 12 of the Criminal Procedure Code Amendment Act (VIII of 1923). The amendment gives effect to the ruling in 29 All 575 cited below.

Object of Section —The intention of this section is to prevent arrest by a private person on mere suspicion or information and the power of arrest by such person is restricted only to *non bailable* and *cognisable* offences committed *in his presence* and to a proclaimed offender—11 Mad 480.

The arrest by a private person is authorised only in case the offence is committed *in the presence* of such person therefore an arrest by a private person would be illegal if it is made after the offence (which is not a continuing one) has been completed before such person comes up and makes the arrest—35 Cal 261. Thus a private person has no power to arrest a thief who is running away after theft, where the theft did not take place in the presence of such person—1922 P L R 19= 23 Cr I J 3.

Make over to a police officer —A village Chowkidar (17 Cal 366, 41 Cal. 17, 17 C W N 978) a Village Taluqari or a Village Toti (5 Mad 22) is not a Police officer.

'Take such person to the Police station —It is not the intention of the Legislature that the person making the arrest should be bound himself to take the arrested person to the Police station—19 All 575, 11 Mad 480. The directions are sufficiently complied with if the person arresting the accused forwards him in charge of a servant or a village servant *etc*. This is now made clear by the addition of the words 'or cause him to be taken

60 A police officer making an arrest without warrant

shall, without unnecessary delay and subject to the provisions herein contained as to how to take or send the person arrested

Person arrested to be taken before Magistrate or officer in charge of police station

before a Magistrate having jurisdiction in the case or before the officer in charge of a police station

Send the person :—On a police officer arresting a person, the prisoner should not be kept in confinement in any place which the officer might select, but should be sent immediately to the Police station and be placed in the custody of the officer in charge of the station who is the person entrusted by the Act with the conduct of the enquiry—7 W. R. 3

Report to the Magistrate —Where a policeman arrested a thief, but being himself unable to send or take the accused to a Magistrate, made a report, upon which the Magistrate issued a warrant, it was held under the circumstances that the accused was legally brought before the Magistrate—5 B H C R 99

61. No police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

Person arrested not to be detained more than twenty-four hours

Object of section —The intention of the Legislature, having regard to this section, is that an accused person should be brought before a Magistrate competent to try or commit, with as little delay as possible—11 Mad. 98.

'Detain in custody' —Where a person received a letter from a Police officer directing him to go to a place to present himself before a Magistrate, and two constables were directed to accompany him to the place to which he had been directed to go, it was held that he was arrested and kept in custody—2 M. H. C. R 396

Period of detention —In no case is a Police officer justified in detaining a person for a single hour in excess of 24 hours without bringing him before a Magistrate, except upon some reasonable ground justified by all the circumstances of the case—6 W. R. 88 Even if a person be rightly arrested, it does not rest with the police officer to keep the prisoner in custody where and as long as he pleases Under no circumstances can he be detained without the special order of a Magistrate for more than 24 hours. Unless the special order has been obtained, the prisoner must either be discharged or sent on to the Magistrate, and any longer detention is absolutely unlawful—7 W. R. 3

Detention for more than 24 hours must be under a special order from the Magistrate. At the expiration of 24 hours from the time of arrest, the accused must be brought before a Magistrate who can remand him—

demand of a police-officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of section 57. If there is no sufficient reason to believe that he has committed any offence, he shall be at once released.

Change —Subsection (1) has been re drafted, and the words "or cause him to be taken in custody" have been added, by sec 12 of the Criminal Procedure Code Amendment Act (XVIII of 1923). The amendment gives effect to the ruling in 29 All 575 cited below.

Object of Section —The intention of this section is to prevent arrest by a private person on mere suspicion or information and the power of arrest by such person is restricted only to *non bailable* and *cognizable* offences committed *in his presence*, and to a proclaimed offender—11 Mad 480.

The arrest by a private person is authorised only in case the offence is committed in *the presence* of such person, therefore an arrest by a private person would be illegal if it is made after the offence (which is not a continuing one) has been completed before such person comes up and makes the arrest—35 Cal 261. Thus a private person has no power to arrest a thief who is running away after theft, where the theft did not take place in the presence of such person—1922 P. L. R. 19 = 23 Cr. L. J. 3.

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60 A police-officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station.

Person arrested to be taken before Magistrate or officer in charge of police-station

Send the person —On a police officer arresting a person, the prisoner should not be kept in confinement in any place which the officer might select, but should be sent immediately to the Police station and be placed in the custody of the officer in charge of the station who is the person entrusted by the Act with the conduct of the enquiry—7 W R 3

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Detention for more than 24 hours must be under a special order from the Magistrate At the expiration of 24 hours from the time of arrest the accused must be brought before a Magistrate who can remand him.

under sec 344 for a period not exceeding 15 days—5 B H C R 31
The order of a Magistrate sanctioning the detention of a person for an indefinite period is illegal—*Ibid*

The provisions of this section are imperative and where a Police officer is charged with having detained prisoners for more than 24 hours without the special order of a Magistrate, it is not necessary for the Court to prove guilty knowledge on the part of the Police officer so detaining them—19 W R 36

An accused person arrested at a great distance from the scene of offence cannot legally be taken there for local investigation without a special order of a Magistrate under sec 167, if such taking involves detention beyond the period of 24 hours allowed by this section—Cr R no 6 of 23rd June, 1902

The detention for 24 hours mentioned in this section means *continuous* detention for 24 hours. This section does not apply to cases where there has not been a continuous detention for more than 24 hours. The law does not mean that the number of hours an accused person is detained at a thana is to be added up irrespective of circumstances. Thus, where the accused person was brought to the thana at 3 o'clock in the afternoon and was allowed to go (to get bail) at noon the next day, and was not a prisoner in the thana till his return on the morning of the next day and then he was sent up to the sudder station by the evening, held that there was no *continuous* detention for more than 24 hours—1 W R 5

Time occupied in journey —The time occupied in journey to the Magistrate is not to be counted in the 24 hours but it is the duty of the Magistrate to see that the time so occupied is reasonable, with reference to the distance to be travelled and other local considerations—Ratanlal 22

62 Officers in charge of police stations shall report to the District Magistrate, or, if he so directs, to the Sub divisional Magistrate, the cases of all persons arrested without warrant, within the limits of their respective stations whether such persons have been admitted to bail or otherwise

Failure to report on the part of the police officer is punishable under section 217 I P Code

63 No person who has been arrested by a police officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate

Discharge of person apprehended

Police to report apprehensions

64 When any offence is committed in the presence of a Magistrate within the local limits of his jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail, commit the offender to custody

Offence committed in
Magistrate's presence

Secs 64 and 556 —Although this section gives to a Magistrate authority to arrest a person committing an offence in his presence yet it is clearly not intended to trench upon the general principle embodied in sec 556 of this Code, that no Judge or Magistrate shall try a case in which he is personally interested. Therefore where a Magistrate while travelling in a railway carriage requested the accused who were his fellow passengers to desist from smoking and on their contemptuously refusing to do so arrested and subsequently tried and convicted them it was held that the Magistrate was legally and morally disqualified from exercising his judicial functions in relation to the offence imputed—*Ratanlal* 339

65 Any Magistrate may at any time arrest or direct the arrest, in his presence, within the local limits of his jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant

Arrest by or in pre-
sence of Magistrate

Arrest under Bombay Gambling Act —Under the provisions of sec 6 of the Bombay Gambling Act IV of 1887 a first class Magistrate has power to give authority under a special warrant to a Police officer to make an arrest and search but those provisions must be subject to the provisions of sec 6, of this Code that is the warrant can only be issued by a Magistrate who has authority to make the arrest and search himself, if necessary—31 Bom 438

66 If a person in lawful custody escapes or is rescued the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place in British India

Power on escape to
pursue and retake

67 The provisions of sections 47, 48 and 49 shall apply to arrest under section 66 although the person making any such arrest is not acting under a warrant and is not a police-officer having authority to arrest

Provisions of sections
47, 48 and 49 to apply to
arrest under section 66

CHAPTER VI

OF PROCEEDINGS TO COMPEL APPEARANCE

A—Summons

68 (1) Every summons issued by a Court under this Code shall be in writing in duplicate signed and sealed by the presiding officer of such Court, or by such other officer as the High Court may, from time to time, by rule, direct

(2) Such summons shall be served by a police officer, or subject to such rules as the Local Government may prescribe in this behalf, by an officer of the Court issuing it or other public servant

(3) This section applies to the police in the towns of Calcutta and Bombay

Scope —The corresponding sections in the Code of 1872 (secs 152 and 153) were limited to service of summons against an accused person only. The scope has now been enlarged. This is the only section which provides for the issue of a summons under this Code and a summons to an assessor must comply with the terms of this section—1 C W N cxvi

Application for summons —Duty of Court —When an application is made for a process to compel the appearance of witnesses it is the duty of the Court to pass an order either granting the prayer or refusing it. To make a mere order 'file' is to leave the matter open and is improper—6 C W N 548

Formalities —A summons should be clear and specific in its terms as to the title of the Court, the place at which and the day and the time of the day when the attendance of the person summoned is required and it should go on to say that such person is not to leave the Court without permission and if the case in which he has been summoned is adjourned, without ascertaining the date of the adjournment—5 All -

If these formalities are not duly observed a conviction for non attendance in obedience to the summons cannot be sustained—111

Where a defendant was summoned to appear before a Magistrate on a certain date but the summons did not specify the *place* at which he was to appear, it was held, that the Magistrate was not competent to dispose of the case *ex parte*—7 M. H. C. R. App. 43. See 1 Weir 100

A summons should contain the name of the father of the person summoned, his caste or tribe and his residence, so as to place his identity beyond all doubt—See Punj Cir Vol II, p. 151. In a process issued against a person residing in a large town, the description should contain not merely the name and father's name of the person to whom the process is addressed, and the name only of the town in which such person resides, but should give such further particulars regarding the section or street of the town in which such person resides as can be ascertained and will facilitate his identification—Cal G. R. & C. O. Ch. I, Rule 19

Signing—Signing not by full name but by initials is only an irregularity, and does not affect the validity of the proceedings—Sec. 537. *Illustration* The illustration to sec 537 has now been omitted by the 1923 Amendment Act, but the law has not been changed. See also 8 All 293 and 3 P. L. J. 493.

'Sealed'—A summons which is not sealed is not valid in law, and therefore disobedience to a summons not sealed is not an offence—1 Weir 100; 37 M. L. J. 538.

"By whom served".—Under clause (2) of section 68 of the Criminal Procedure Code, the Lieutenant Governor of Bengal has declared that the processes issued under that Act shall be served by peons appointed under the rules framed by the High Court under sec. 22 of the Court Fees Act VII of 1870. *vide* Notification, Government of Bengal, the 11th May 1883, *Calcutta Gazette*, 23rd May 1883, page 426. Similar Orders were passed by the Chief Commissioner of Assam, see *Assam Gazette*, 23rd June 1883, page 290

69. (1) The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons

(2) Every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

(3) Service of a summons on an incorporated company or other body corporate may be effected by serving it on

the secretary, local manager or other principal officer of the corporation or by registered post letter addressed to the chief officer of the corporation in British India. In such case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.

This is the only section which provides for the procedure of service of summons, and every summons (e.g. summons to attend as assessor) under this Code must be served in accordance with the provisions of this section. Any other mode (e.g. sending summons by post or under registered cover) is illegal and not justifiable—1 C. W. N. cxvi.

Service how effected:—The mere showing of a summons to the person summoned is not sufficient service. Either the original should be with the party meant to be served, or should be exhibited to him, and a copy of it delivered to him—5 B. H. C. R. 20.

Refusal to take or sign:—If however the person refuses to take the summons, the mere tendering is sufficient service—6 A. W. N. 93; 40 All 577. What is necessary to the service of summons is that the summons should be delivered or tendered; and if the summons is delivered or tendered, then it is served, whether the person signs a receipt for it or not—5 B. H. C. R. 34.

70 Where the person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family, or, in a presidency-town, with his servant residing with him; and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

"Cannot be found":—Before the Court can proceed against the accused, it must be shown by affidavit of the person entrusted with the service of summons that he made his best endeavours to effect personal service on the accused, and that the accused evaded service or that he could not be found by the exercise of due diligence—2 A. W. N. 170.

Service on servant:—*Outside the Presidency Towns*, a service of summons on a juror cannot be effected on his servant—19 A. W. N. 13.

71. If service in the manner mentioned in sections 69 and 70 cannot by the exercise of due diligence be effected, the serving officer shall affix one of the duplicates of the

Procedure when service cannot be effected as before provided.

summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides, and thereupon the summons shall be deemed to have been duly served

Where sufficient steps are not taken to serve the accused personally and there is want of reasonable diligence in that behalf, a substituted service of summons is improper—69 Ind Cas 627 (Nag)

72 (1) Where the person summoned is in the active service of the Government or of a Rail-
Service on servant of Government or of Railway Company way Company, the Court issuing the summons shall ordinarily send it in duplicate to the head of the office in which such person is employed, and such head shall thereupon cause the summons to be served in manner provided by section 69, and shall return it to the Court under his signature with the endorsement required by that section

(2) Such signature shall be evidence of due service

Mode of service on Government employees —See Cal High Court G R & C O, Ch I, Rules 14 18, All R O pages 7 8, Punj Cir Vol II, pp 152 153

Scope —This section is intended to apply only to summonses issued by a Court of Justice and not to orders of police officers investigating a crime under Chap XIV of this Code—18 Cr L J 733 (Mad)

73 When a Court desires that a summons issued by
Service of summons outside local limits it shall be served at any place outside the local limits of its jurisdiction, it shall ordinarily send such summons in duplicate to a Magistrate within the local limits of whose jurisdiction the person summoned resides or is, to be there served

74 (1) When a summons issued by a Court is served
Proof of service in such cases and when serving officer not present outside the local limits of its jurisdiction, and in any case where the officer who has served a summons is not present at the hearing of the case, an affidavit, purporting to be made before a Magistrate, that such summons has been served, and a duplicate of the summons purporting to be

endorsed (in manner provided by section 69 or section 70) by the person to whom it was delivered or tendered or with whom it was left, shall be admissible in evidence, and the statements made therein shall be deemed to be correct unless and until the contrary is proved.

(2) The affidavit mentioned in this section may be attached to the duplicate of the summons and returned to the Court

B.—Warrant of Arrest.

75. (1) Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer, or in the case of a Bench of Magistrates, by any member of such Bench, and shall bear the seal of the Court.

(2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed

Grounds for issuing warrants—A Magistrate should issue a warrant on good and legal grounds. It is essential that he should have a knowledge of the offence having been committed, and that knowledge must be either personal or derived from testimony legally given before him. The report of the Police or any statement which is not on oath and which falls short of actual formal complaint is not sufficient to give the Magistrate jurisdiction to issue a warrant—13 W R 27

Purdashin lady—Until and unless a Magistrate is convinced that there is strong likelihood of the charge being proved, a purdushin lady of good position should not be ordinarily compelled to appear in person in the first instance—1908 P. W. R 20.

Form of warrant—When any Act does not provide a form of warrant, the form to be used is the ordinary one prescribed by this Code—18 Bom 636.

General warrants—The issuing of a general warrant, which means a warrant to apprehend all persons committing a particular offence or offences, is illegal—9 B H. C R. 154

Conditional warrants—A warrant which directs that in the event of a certain named person not leaving British India forthwith all officers to whom the warrant is directed are to arrest that person, is invalid—

(d) The person named in the warrant must be described with sufficient certainty and particularity—15 Form 626. The warrant must give *facta et nomina* of the person to be arrested so as to identify him clearly. A warrant which directs the committal of James Hastings without giving any further description of him, is invalid, since it may lead to the arrest of any person bearing that name—9 B H C R 154. So also, a warrant containing a wrong description (*et cetera*, giving a wrong name of the accused) is invalid—25 Cal 377.

(e) The warrant must specify the offence. Where a warrant was issued for the arrest of a person on a charge of abduction, it was held that since the act with which the accused was charged did not amount to an offence without a specific intention, the warrant must state the intent with which the offence was committed otherwise it would be invalid—15 W R 4.

(f) And lastly, the warrant must name the person who is to execute it. If the name is left blank, the warrant is invalid—14 Cr L J 142 (Punjab). A warrant not addressed to a bailiff as required by Form 154 of Sch 5 of this Code, or to any other person is not valid—1904 2, R 16.

Language of warrant —A warrant should be written in the language of the District from which it is issued. If sent to another District or Province where a different language is in ordinary use, it should be invariably accompanied by a translation—Cal H. C. R. and O p 3; Bom. H. C. Cr. Cir. p 10.

Warrant by telegram :—A Court should not issue a judicial order or communicate the purport of a warrant or process by telegram—N. W. P. Reg. and Ord. p. 71.

'Shall remain in force' :—When the law has not fixed any period limiting the duration of a warrant, the presumption is that it remains valid until it is executed—28 Bom. 129.

A warrant on which there is an endorsement for bail to be taken for the appearance of the accused on a particular date, does not lapse on the expiry of that date; after that date, only the direction to take bail lapses, but the warrant continues in force until it is cancelled by the Court which issued it, or until it is executed—13 C. W. N. 1091.

Cancellation of warrant :—A Magistrate has discretion on sufficient cause shown to cancel a warrant and issue summons instead—1 S. L. R. 69, 1908 P. W. R 20

When a warrant is cancelled, it is at an end and cannot be re issued—1 C. W. N. 650

76 (1) Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.

Court may direct security to be taken.

(2) The endorsement shall state—

(a) the number of sureties;

(b) the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound; and

(c) the time at which he is to attend before the Court.

(3) Whenever security is taken under this section, the officer to whom the warrant is directed shall forward the bond to the Court.

Recognition is to be forwarded.

77 1) A warrant of arrest shall ordinarily be directed ^{Warrant to whom directed} to one or more police officers, and when issued by a Presidency Magistrate shall always be so directed, but any other Court issuing such a warrant may, if its immediate execution is necessary and no police-officer is immediately available direct it to any other person or persons and such person or persons shall execute the same

(2) When a warrant is directed to more officers or persons ^{Warrant to several persons} than one, it may be executed by all or by any one or more of them

Name of Police officer not necessary —This section merely directs that a warrant shall be ordinarily directed to one or more Police officers but it does not say that the *name* of that Police officer should be inserted in the warrant as well as his designation—J. P. L. J. 493 The reasons have been thus stated —“It would be extremely difficult to carry on the Police Administration of the country if every warrant had to be directed by name to a Police officer and upon his transfer it were to become incapable of execution till the name of some other officer had been substituted in his place —*Id.*”

Warrant by Presidency Magistrate —A warrant issued by a Presi

dency Magistrate shall always be directed to Police-officers. Where such a warrant was directed to a person other than a Police officer though such officer was immediately available, the High Court severely criticized the procedure—8 W. R. 74

Any other person —A Magistrate may, under this section, direct a warrant to an unofficial person only when its immediate execution is necessary, and when he cannot immediately obtain the assistance of the Police—13 W. R. 27

78 (1) A District Magistrate or Sub-divisional Magistrate may direct a warrant to any landholder, farmer or manager of land within his district or sub-division for the arrest of any escaped convict, proclaimed offender or person who has been accused of a non-bailable offence, and who eluded pursuit.

Warrant may be directed to landholders, etc.

(2) Such landholder, farmer or manager shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued is in, or enters on, his land or farm, or the land under his charge.

(3) When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest police-officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken under section 76.

79. A warrant directed to any police-officer may also be executed by any other police-officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed.

Warrant directed to police-officer.

Any other police officer —A process serving peon is not included in the term 'any other police officer' in the section—27 Cal. 457

Endorsement —The endorsement should be regularly made by name to a certain person, in order to authorise him to make the arrest—4 C. W. N. 85

Again, the endorsement must be made by the Police officer to whom the warrant is directed. Where a warrant was directed to a Court Sub Inspector and the endorsement was made by the Court Head Constable, it was held to be invalid—27 Cal. 457.

Warrant under special Acts —A special warrant issued under sec. 6 of the Bombay Gambling Act IV of 1887 cannot be executed by any other officer except the officer therein named—3 S. L. R. 56. Similarly a warrant under sec. 45 of the Bengal Chowkidari Act (VI of 1870, B. C.) can be executed only by the person named therein—37 Cal 122. The Burma Gambling Act does not contain any provision for endorsement of the warrant issued under section 6 of that Act by the officer to whom it is issued to another officer—21 Cr. L. J. 9

80 The police-officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant

Notification of substance of warrant.

Scope of section —This section applies only to warrants, and not to an order in writing under sec 56 See 27 Cal. 320, cited under Sec 56.

Notify the substance —Where a Police officer simply shows the warrant to the accused but does not give him an opportunity of reading it, and does not notify its substance to him, the arrest so made is unlawful—26 Cal. 748, 23 Cal 896 But if the Police officer shows the warrant to the accused and gives him sufficient opportunity of reading the warrant itself, the omission on the part of the officer to explain the particulars of the warrant does not invalidate the arrest, because, all that this section requires is that the accused should have reasonable opportunity of knowing on what charge he is being arrested and before what Court he is to appear, so that he may take steps for arranging for his defence —3 P. L. J. 493

Show the warrant —This implies that the arresting officer must have the warrant of arrest in his possession at the time of making the arrest, otherwise it is illegal—5 All 318, see also 27 All 258

Mere showing is not sufficient An opportunity should be given to the person to be arrested by showing him the warrant so that he might read it (26 Cal 748) and see that the person arresting has authority—23 Cal. 896, 26 Cal 748, 10 Cal 18, 13 Bom 168

81 The police officer or other person executing a warrant of arrest shall (subject to the provisions of section 76 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person.

Person arrested to be brought before Court without delay.

Further detention —When the arrested person is brought before the Magistrate, the Magistrate cannot lawfully commit to prison or remand him without sufficient grounds, and in the complete absence of evidence there can be no grounds—13 W. R. 27.

The warrant is exhausted as soon as the person arrested is brought before the Court. If the accused is to be further detained, it must be under some fresh warrant or order, such as an order of remand under Sec. 344. The warrant for further detention would be one of commitment directed to some jailor or other person having authority to receive and keep the prisoner—13 W. R. 1.

Where warrant may be executed.

82 A warrant of arrest may be executed at any place in British India.

Outside British India.—Where the accused was arrested by a constable of the Jeypur State, and was afterwards arrested by a British Constable in the Residency of Jeypur, the arrest was made outside British India—7 Bur. L. R. 83

The grant by the Nizam to the British Government of civil and criminal jurisdiction along the line of Hyderabad State Railway, as in the case of other lines running through Independent States, does not justify the arrest on the lands of the State Railway of a subject of the Nizam under the warrant of a Magistrate in British India for an offence committed in a British territory and not committed in the Railway nor in any way connected with the administration of the Railway—25 Cal. 20 (P. C.)

83. (1) When a warrant is to be executed outside the local limits of the jurisdiction of the Court issuing the same, such Court may, instead of directing such warrant to a police-officer, forward *the same by post or otherwise to any Magistrate or District Superintendent of Police or the Commissioner of Police in a presidency-town within the local limits of whose jurisdiction it is to be executed.*

Warrant forwarded for execution outside jurisdiction.

(2) The Magistrate or District Superintendent or Commissioner to whom such warrant is so forwarded shall endorse his name thereon and, if practicable, cause it to be executed in manner hereinbefore provided within the local limits of his jurisdiction

Warrant under Act XIII of 1859.—The provisions of this section read with Sec. 5 apply to a warrant issued under the Workmen's Breach

of Contract Act Therefore a Magistrate cannot refuse to execute within his district a warrant issued by a Magistrate of another district under that Act—1898 P R 11, 20 Mad 235, 20 Mad 457, 20 All 124

84 (1) When a warrant directed to a police officer is to be executed beyond the local limits of the jurisdiction of the Court issuing the same, he shall ordinarily take it for endorsement either to a Magistrate or to a police officer not below the rank of an officer in charge of a station, within the local limits of whose jurisdiction the warrant is to be executed

Warrant directed to police officer for execution outside jurisdiction

(2) Such Magistrate or police officer shall endorse his name thereon and such endorsement shall be sufficient authority to the police officer to whom the warrant is directed to execute the same within such limits and the local police shall, if so required assist such officer in executing such warrant

(3) Whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate or police officer within the local limits of whose jurisdiction the warrant is to be executed, will prevent such execution, the police officer to whom it is directed may execute the same without such endorsement in any place beyond the local limits of the jurisdiction of the Court which issued it

(4) This section applies also to the police in the town of Calcutta

85 When a warrant of arrest is executed outside the district in which it was issued the person arrested shall unless the Court which issued the warrant is within twenty miles of the place of arrest or is nearer than the Magistrate or District Superintendent of Police or the Commissioner of Police in a presidency town within the local limits of whose jurisdiction the arrest was made or unless security is taken under section 76 be taken before such Magistrate or Commissioner or District Superintendent

Procedure on arrest of person against whom warrant issued

86. (1) Such Magistrate or District Superintendent or Commissioner shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court :

Procedure by Magistrate before whom person arrested is brought.

Provided that, if the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate, District Superintendent or Commissioner, or a direction has been endorsed under section 76 on the warrant and such person is ready and willing to give the security required by such direction, the Magistrate, District Superintendent or Commissioner shall take such bail or security, as the case may be, and forward the bond to the Court which issued the warrant.

(2) Nothing in this section shall be deemed to prevent a police-officer from taking security under section 76.

C.—Proclamation and Attachment.

87. (1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.

(2) The proclamation shall be published as follows :—

(a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides ;

(b) it shall be affixed to some conspicuous place of the house or home in which such person ordinarily resides or to some conspicuous place of the town or village ; and

thereof shall be sent to some of the Courts.

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

Summons cases —This section read with section 88 shows that even in summons cases and as against witnesses, a proclamation may be issued. But to lay a foundation for the issue of a proclamation under this section with an accompanying order of attachment under Sec 88, it is necessary strictly to comply with the provisions of law relating to the issue of a warrant in a case where a summons is the ordinary mode of enforcing attendance—5 N. L. R. 125

Conditions precedent to proclamation —The processes of attachment and proclamation are not to issue whenever a warrant fails of its effects. Before issuing a proclamation, the officer sent to serve the proclamation must be examined as to the measures adopted by him to serve it. If on his evidence or in any other manner, the Magistrate is satisfied that the accused is absconding or concealing, then and then only the processes of proclamation and attachment may be issued—3 W. R. 63; 6 W. R. 73; 3 L. B. R. 116, 19 W. R. 12; 5 N. L. R. 125

The previous issue of a warrant against the person whose attendance is required before the Court, is a necessary condition. Therefore if the Court has no authority to issue a warrant, an order for the issue of proclamation and a subsequent order for attachment are all illegal—1893 P. R. 15, 14 Bom. L. R. 889

Absconding —The term "abscond" does not necessarily imply change of place. Its etymological and ordinary sense is "to hide oneself" and it matters not if a person departs from his place or remains in it, if he conceals himself. Moreover, the term does not apply to the commencement of concealment. If a person having concealed himself, before process issues, continues to do so, after it is issued, he absconds—4 Mad. 393.

To be deemed as an absconder, one need not be proclaimed as such under this section. But an absent person should not be too readily assumed to be an absconder without due inquiry and notice—2 Weir. 40.

A man who files a petition against an order issuing the warrant and takes steps to procure the order of a superior Court that he should be allowed to remain on bail after such warrant has been issued, cannot be said to be absconding or concealing himself—23 Cr. L. J. 454 (Lah.)

Mode of publication :—The provisions of subsection (2) as to the mode of publishing a proclamation are imperative and failure to comply with the rules will vitiate the proclamation. All the three modes must be adopted—27 All 572 ; 1917 P. R. 6. Thus where the proclamation was not duly published, it was illegal and the subsequent attachment of the property must be set aside—19 Mad. 3.

But where the proclamation was made and was read and published in the places where the absconders were most likely to hear of them, but a copy was not affixed to the Court-house, the flaw would in no way prejudice the proceedings, and would be cured by section 537 of this Code—1917 P. R. 39.

The most important part of the publication is the publishing of the proclamation in the accused's place of residence and it is from the date of the publication that the 30 days should be counted—1917 P. R. 6 ; 19 Mad. 3.

Not only the provisions of this section must be strictly complied with, but the Court should also preserve records to show that the formalities were strictly observed. Where such records were lost, the High Court set aside the proclamation and order of attachment and restored the property to the owner—14 Bom. L. R. 163.

Burden of proof —It is on the prosecution to prove that the proclamation was made in the manner prescribed by this section—7 Mad. 436.

Thirty days' time —The period of thirty days is to run from the date on which the publication was effected—19 W. R. 12.

It is to be counted from the date of publication of the proclamation in the place of residence of the accused—1917 P. R. 6.

The rules prescribed by this section with regard to time and place are imperative and if the date fixed for the appearance of the accused is less than 30 days from the date of publishing the proclamation, it is illegal and liable to be set aside—17 M. L. J. 438 ; 19 Mad 3 ; 1919 P. R. 32 ; and all subsequent proceedings (attachment and sale) will also be invalid and must be quashed—1919 P. R. 32.

Disobedience to proclamation :—An accused person against whom a proclamation has been issued must, until he has surrendered, be regarded as in contempt, and the Court will not entertain any application on his behalf. He must appear before the Magistrate and apply to him to be discharged on the ground that the warrant is informal or offer some explanation by way of purging his contempt, and at the same time application might be made for the release of his property. It will then be the duty of the Magistrate to determine judicially whether the warrants are valid, and when he had done so, the person against whom and whose property the warrants are respectively issued may, if he be so advised,

apply for the revision of proceedings—2 N. W. P. H. C. R. 441, 5 W. L. 71

Statement in writing—When there is no endorsement or statement in writing made by the Court validating the proclamation, the proclamation is not made according to law and subsequent attachment and sale are invalid—27 All. 572 22 All. 216 There must be records in the Court to show that the formalities were strictly observed Where such records were lost the High Court set aside the proclamation and attachment and restored the property to the owner—14 Bom. L. R. 163

The statement in writing should state clearly that the proclamation was duly published, and should also mention the date of publishing the proclamation Where the validating order merely stated that the proclamation was duly published but omitted to specify the date of the publication *held* that it could not be considered as a conclusive evidence that the requirements of Sec. 87 had been complied with—1919 P. R. 37

88 (1) The Court issuing a proclamation under section 87 may at any time order the attachment of any property, moveable or immovable, or both, belonging to the proclaimed person

Attachment of property of person absconding

(2) Such order shall authorize the attachment of any property belonging to such person within the district in which it is made, and it shall authorize the attachment of any property belonging to such person without such district when endorsed by the Magistrate or Chief Presidency Magistrate within whose district such property is situated

(3) If the property ordered to be attached is a debt or other moveable property the attachment under this section shall be made—

- (a) by seizure or
- (b) by the appointment of a receiver, or
- (c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf or
- (d) by all or any two of such methods as the Court thinks fit

(4) If the property ordered to be attached is immovable, the attachment under this section shall, in the case of land paying revenue to Government, be made through the

Collector of the district in which the land is situate, and in all other cases—

- (e) by taking possession, or
- (f) by the appointment of a receiver, or
- (g) by an order in writing prohibiting the payment of rent or delivery of property to the proclaimed person or to any one on his behalf or
- (h) by all or any two of such methods as the Court thinks fit

(5) If the property ordered to be attached consists of livestock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court

(6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under Chapter XXXVI of the Code of Civil Procedure, 1882

(6A) If any claim is preferred to, or objection made to the attachment of, any property attached under this section within six months from the date of such attachment by any person other than the proclaimed person on the ground that the claimant or objector has an interest in such property and that such interest is not liable to attachment under this section the claim or objection shall be enquired into and may be allowed or disallowed in whole or in part

Provided that any claim preferred or objection made within the period allowed by this sub section may in the event of the death of the claimant or objector be continued by his legal representative

(6B) Claims or objections under sub section (6A) may be preferred or made in the Court by which the order of attachment is issued or, if the claim or objection is in respect of property attached under an order endorsed by a District Magistrate or Chief Presidency Magistrate in accordance

with the provisions of sub section (2), in the Court of such Magistrate

(6C) *Every such claim or objection shall be inquired into by the Court in which it is preferred or made*

Provided that, if it is preferred or made in the Court of a District Magistrate or Chief Presidency Magistrate, such Magistrate may make it over for disposal to any Magistrate of the first or second class or to any Presidency Magistrate, as the case may be, subordinate to him

(6D) *Any person whose claim or objection has been disallowed in whole or in part by an order under sub section (6A) may within a period of one year from the date of such order, institute a suit to establish the right which he claims in respect of the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive*

(6E) *If the proclaimed person appears within the time specified in the proclamation, the Court shall make an order releasing the property from the attachment*

(7) *If the proclaimed person does not appear within the time specified in the proclamation the property under attachment shall be at the disposal of Government, but it shall not be sold until the expiration of six months from the date of the attachment and until any claim preferred or objection made under sub-section 6A has been disposed of under that sub section unless it is subject to speedy and natural decay, or the Court considers that the sale would be for the benefit of the owner, in either of which cases the Court may cause it to be sold whenever it thinks fit*

Change —Subsections 6A to 6E, and the italicised words in subsection (7) have been added by Sec 13 of the Criminal Procedure Code Amendment Act, XVIII of 1923. The reasons are stated below in their proper places

Proclamation and attachment —A Magistrate may issue a simultaneous order of proclamation (under Sec 87) and attachment (under this section)—29 Cal 417

At any time —Since the object of attachment is to enforce the appearance of the absconder, the attachment must immediately follow

the proclamation, and it is unnecessary or even illegal to wait till the time specified in the proclamation has run out and then to order attachment because the proclamation has not been obeyed—6 C P L R 38

Opportunity to show cause —An order of attachment made against an absconder without permitting him to show cause against such order, after he is apprehended and brought to trial before the passing of the order, is bad in law and must be set aside. The Magistrate is not at liberty to consider such a hearing superfluous on the ground that the petitioner's plea had been overruled in the trial for the substantive offence with which he was charged—5 W R 8

Irregularity in proclamation vitiates attachment —Any irregularity or defect in publishing the proclamation will vitiate the order of attachment. In 19 Mad 3 the High Court set aside the order of attachment and restored the property to the owner. In 17 W R 10 the High Court, although did not question the attachment yet prohibited the Magistrate to hold the sale until all the formalities were strictly carried out. In 27 All 572 and 24 A W N 159, the sale was set aside by reason of the irregularity in the publication of the proclamation.

Property —The words of the section "order the attachment of any property moveable or immoveable" are enabling and not restrictive, so that the Court may attach both kinds of property—4 M H C R App 48

But the Magistrate has no power to order the attachment of any property that does not belong to the absconder. He should be most careful not to interfere with or disturb the rights of third persons—7 W R 35

The undivided property of a coparcener of a joint Hindu family cannot be attached because his interest cannot be ascertained—2 Weir 43. Contra—2 Weir 43 (Footnote)

The unascertained share of a partner in the assets of the partnership which were then in the hands of a Receiver under a winding up order was not attachable, such share not being "property belonging to the defendants"—5 B L R 382. But the share of a judgment debtor in partnership with another person who alone was in possession of the property at the time of attachment was liable to attachment but the attachment must be by prohibitory order and not by actual seizure—3 B L R 36

Subsection (6A)—Claims of third parties —Before the addition of this subsection by the Amendment Act of 1923 it has been held in a number of cases that Sec 88 and 89 do not provide for the investigation by a Magistrate of the claims of third parties whose property has been attached as the property of the accused. The remedy of the claimant

is by way of a civil suit, as the question is one more for the Civil Court than for the Magistrate—6 All 487; 7 W. R. 35, 4 L. B. R. 109; 20 Mad 88. These rulings are now rendered obsolete

The proviso to the subsection provides for the continuance of proceedings by the legal representative of a claimant or objector who may die pending the inquiry into his claim or objection

Subsection (6B) —“We have provided for the case of claims to property in another district from that in which the order of attachment was made”—*Report of the Select Committee of 1916*

Subsection (6C) —“The subsections which the Bill adds to section 88 imply that the Court which issues an order of attachment or endorses the same under subsection (2) is to investigate and determine a claim or objection. We think that a limited power to transfer claims and objections for disposal to subordinate Magistrates would be useful, and we have therefore provided that the District Magistrates may transfer such cases to Magistrates not below the rank of second class Magistrates, and that Chief Presidency Magistrates may likewise transfer cases to Presidency Magistrates subordinate to them”—*Report of the Joint Committee (1922)*

Subsection (6D) —“We have provided a period of limitation within which proceedings in a Civil Court to establish a claim which has been disallowed by a Magistrate, must be instituted”—*Report of the Select Committee of 1916*. The language of this subsection may be compared with that of O XXI, rule 63, C P. Code

A civil suit is maintainable by the real owner to recover possession of the property attached, and for damages done to the property while it was at the disposal of the Government—28 Cal 540

No revision of order passed on a claim —It has been held in 6 All 487, 7 W. R. 35, 22 All 216, 22 Cal 935 and 20 Mad 88 that since the Code does not contain any provisions for the investigation of claims of third parties to the attached property, the orders of Magistrates passed on claims of third parties are not judicial proceedings and therefore they are not open to revision under Secs. 435—439 of the Code

Under the present law, though the claim proceeding held by the Magistrate would be a judicial proceeding, still the Magistrate's order in such a proceeding is not liable to revision, because the words “subject to the result of such suit, if any, the order shall be conclusive” show that the order is not liable to be contested in appeal or revision

Subsection (6E) —This subsection did not exist in any of the Bills or in the Reports of the Committees but was added (on the motion of

Mr Rangachariar) during the debate in the Legislative Assembly, see the Debates of the Legislative Assembly, January 17, 1923

Property shall be at disposal of Government —*Condition precedent* —Before the passing of an order declaring the property to be at the disposal of Government, there must be a proclamation specifying a time within which the absconder is required to appear—6 W R 73

No right of Government before declaration —Unless and until there is a declaration that the property is at the disposal of the Government, no right accrues to Government. Therefore where the Police seized certain property of an absconder in August 1911 but did not declare it forfeited until February 1912, an attachment of the property in October 1911 made by a creditor of the absconder in a civil suit would prevail and the refusal of the Magistrate to hand over the property in obedience to the order of the Civil Court was held to be wrong—6 L B R 37. But see 9 Cal 861 cited below

Time —The law does not lay down any express time when the order of forfeiture should be made; if by mistake it has not been passed before the accused appears, it might be passed after he has appeared if he does not satisfy the Court that he has not been evading justice—3 W R 63. But it has been held in 19 W R 12 that if an order of forfeiture has not been made before the person has come in or has been brought in, it ought not to be made at all, because by that time its purpose has been effected though even possibly by other means than that of the process that was evaded

Irregularity —An order of forfeiture under this section, if in substance quite legal, cannot be disturbed on the ground of an irregularity in procedure—8 W R 61

Power to restore property —Property which has been declared to be at the disposal of the Government can be restored to its owner only by the Government and not by the Court—18 W R 33, not even by the High Court—18 W R 33

Subsequent attachment by Civil Court —After the date of attachment by a Magistrate and during its continuance, no title could be conferred by an attachment and sale subsequently made in execution of a money decree—9 Cal 861. See, however, 6 L B R 57 cited above

Sale —*Sale subject to lease* —Where the land sold was subject to a lease, the sale should be subject to the right of the lessees to remain in possession until expiry of the lease—1903 P R 9

Sale of an estate property —Where ancestral property of a person subject to Panjab customary law was sold only his life interest was

disposed of but not the right of inheritance after his death of his lineal descendants and collaterals—1908 P. W. R. 19 (F. B.)

Sale of land paying revenue—This should be done by the Collector and the procedure laid down in the C P Code for execution sales should be strictly followed. See C O no 7 of 17th August, 1878, Cal G R, and C O p 6

Setting aside of sale—Where a sale has taken place and the purchasers have acquired some sort of title, it is not open to the High Court in exercising its revisional power to pass an order affecting the title of persons who are strangers to the legal proceedings in which the order is made, whatever irregularities there may have been in the proceedings—22 All 216

But although no revision lies to set aside the sale, still the owner can institute a suit in a Civil Court for recovery of the property from the purchaser, if it turns out that the proclamation of sale was irregular—24 A. W. N. 159, or if the proclamation is illegal for having failed to state the time and place at which the absconding accused should present himself—27 All 572.

But if there was no irregularity or illegality in the proclamation, and the property which was vatan land was confiscated in due course under section 88 and was granted by the Government to the defendants, and afterwards the absconder appeared and instituted a suit to recover possession of the property, *held* that by the confiscation the title of the absconder was extinguished, and he had no right to sue—25 Bom L R 228

89 If, within two years from the date of the attachment, any person whose property is or has been at the disposal of Government under sub-section (7) of section 88, appears voluntarily or is apprehended and brought before the Court by whose order the property was attached, or the Court to which such Court is subordinate, and proves to the satisfaction of such Court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and that he had not such notice of the proclamation as to enable him to attend within the time specified therein, such property, or, if the same has been sold, the nett proceeds of the sale, or, if part only thereof has been sold, the nett

Restoration of attached property.

proceeds of the sale and the residue of the property, shall, after satisfying thereout all costs incurred in consequence of the attachment, be delivered to him

Scope —This section prescribes a remedy where there has been a good legal publication of proclamation under sec 87, but offers no facility for contesting the legality of an illegal proclamation—22 All 216, 1919 P R 32, 1917 P R 6 But though the petitioner cannot contest the legality of the proclamation in his application under sec 89, there is nothing to prevent the High Court from considering it in the exercise of its revisional jurisdiction—1919 P R 32

In another case the Punjab Chief Court has held that this section does apply to a case where the validity of the attachment proceedings is challenged, for surely it is open to a person to prove that he was not absconding or that there was no publication at all, or that the proclamation was defective, e.g., that it specified no date for his appearance—1917 P R, 39 (disapproving 1917 P R 6)

"Two years" —An application under sec 89 not made within two years from the date of attachment is not entertainable—1917 P R, 6

"And proves etc" —The phrase 'within two years' qualifies not only the word 'appears' but also the word 'proves' therefore it is necessary that the proof that the accused has not been absconding should be offered within two years—15 Bom L R 175

Forfeiture of property —Forfeiture of property of an absconding offender who appears within two years from the attachment of his property should not be carried into effect until after a regular enquiry into the cause of the offender's absence—3 W R 63

Application for restoration —For the purposes of this section it is not necessary that the absconding accused should himself personally apply for the restoration of the property the application can be made by any one on his behalf—15 Bom L R 175

Order releasing property —A Magistrate's direction to his subordinate to write to the Collector and authorise the taking off of a certain attachment will amount to an order releasing the property from attachment—5 W R 8

No civil suit —Where the accused did not appear within two years of attachment and the property was ordered to be sold no civil action could lie to set aside the sale—8 W R 207 (crit)

Appeal —Order refusing restoration of property is appealable; see Sec 475

D.—Other Rules regarding Processes.

90 A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person other than a juror or assessor, issue, after recording its reasons in writing, a warrant for his arrest—

Issue of warrant in lieu of, or in addition to, summons.

- (a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons, or
- (b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.

Scope.—This section applies to witnesses as well as to the accused. But witnesses brought up under arrest should be dealt with not as criminals but simply as persons arrested on civil process Cal High Court G. R. & C. O. p 7.

This section empowers the Court to issue a warrant only in cases in which it is empowered to issue summons, and not in a case in which it has no power to issue the latter—1893 P. R. 15

Recording of reasons.—A Magistrate ought not to issue a warrant, either in lieu of or in addition to summons, in a summons case, unless he has previously recorded his reasons for so doing—5 N. L. R. 125, O. S. C. 99. If he fails to record reasons, the warrant must be regarded as wholly illegal—38 Mad. 1088, 1918 P. L. R. 50, and such omission cannot be overlooked, and cannot be cured by sec. 537—38 Mad. 1088. Thus, in a case under sec. 498 I. P. C. the trying Magistrate is competent to issue warrant, instead of summons, for the attendance of a woman alleged to have been enticed away, but in order to comply with the provisions of this section, it is necessary to record reasons for issuing the warrant in the first instance and if he fails to do so, the warrant is wholly illegal, and consequently the bond given by the surety for the woman's attendance has no legal force and cannot be forfeited if the woman does not appear—1918 P. L. R. 50=1918 P. W. R. 7. But in 18 A. L. J. 1149, in similar proceedings under sec. 498 I. P. Code the omission by the

proceeds of the sale and the residue of the property, shall after satisfying thereout all costs incurred in consequence of the attachment, be delivered to him

Scope —This section prescribes a remedy where there has been a good legal publication of proclamation under sec 87, but offers no facility for contesting the legality of an illegal proclamation—22 All 216 1919 P R 32 1917 P R 6 But though the petitioner cannot contest the legality of the proclamation in his application under sec 89, there is nothing to prevent the High Court from considering it in the exercise of its revisional jurisdiction—1919 P R 32

In another case the Punjab Chief Court has held that this section does apply to a case where the validity of the attachment proceedings is challenged, for surely it is open to a person to prove that he was not absconding or that there was no publication at all, or that the proclamation was defective, *e.g.*, that it specified no date for his appearance—1917 P R. 39 (disapproving 1917 P R 6)

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Forfeiture of property —Forfeiture of property of an absconding offender who appears within two years from the attachment of his property should not be carried into effect until after a regular enquiry into the cause of the offender's absence—3 W R 63

Application for restoration —For the purposes of this section it is not necessary that the absconding accused should himself personally apply for the restoration of the property the application can be made by any one on his behalf—15 Bom L R 175

Order releasing property —A Magistrate's direction to his subordinate to write to the Collector and authorise the taking off of a certain attachment will amount to an order releasing the property from attachment—5 W R 8

No civil suit —Where the accused did not appear within two years of attachment and the property was ordered to be sold no civil action could lie to set aside the sale—8 W R 407 (civil)

Appeal —Order refusing restoration of property is appealable, see Sec 405

D.—Other Rules regarding Processes.

90. A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person other than a juror or assessor, issue, after recording its reasons in writing, a warrant for his arrest—

Issue of warrant in lieu of, or in addition to, summons.

- (a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons, or
- (b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.

Scope :—This section applies to witnesses as well as to the accused. But witnesses brought up under arrest should be dealt with not as criminals but simply as persons arrested on civil process. Cal. High Court G. R. & C O p 7.

This section empowers the Court to issue a warrant only in cases in which it is empowered to issue summons, and not in a case in which it has no power to issue the latter—1893 P R 15

Recording of reasons —A Magistrate ought not to issue a warrant, either in lieu of or in addition to summons, in a summons case, unless he has previously recorded his reasons for so doing—5 N L R 125; O. S. C 99 If he fails to record reasons, the warrant must be regarded as wholly illegal—38 Mad 1088, 1918 P L R 50, and such omission cannot be overlooked, and cannot be cured by sec. 537—38 Mad 1088 Thus, in a case under sec. 498 I P C the trying Magistrate is competent to issue warrant, instead of summons, for the attendance of a woman alleged to have been enticed away, but in order to comply with the provisions of this section, it is necessary to record reasons for issuing the warrant in the first instance and if he fails to do so, the warrant is wholly illegal; and consequently the bond given by the surety for the woman's attendance has no legal force and cannot be forfeited if the woman does not appear—1918 P. L. R. 50=1918 P. W. R 7 But in 18 A. L. J 1149, in similar proceedings under sec. 498 I. P Code the omission by the

Magistrate to record reasons for the issue of a warrant in the first instance was held to be a mere irregularity curable under sec 537 of this Code

Issue of warrant in the first instance—Grounds —In the absence of special grounds mentioned in this section, the Court ought to issue a summons—5 N L R 125, 3 L B R 116 Great care should be taken that a warrant which implies personal arrest and restraint never goes forth when a summons to attend would be sufficient for the ends of justice—Punj Cir, Chap XLI, p 144

A warrant cannot be issued to enforce the attendance of a witness unless the Magistrate is first satisfied that the witness will disobey or has disobeyed the summons served on him—14 W R 20, or unless he believes that the witness will not give evidence voluntarily—13 W R 1 or unless it is proved that summons has been duly served, and in spite of it the witness did not appear—7 W R 37, 3 L B R 116

Where in proceedings under section 498 I P C the complainant stated on oath that a warrant should be issued for the attendance of the abducted woman, or else the accused would remove the woman from their house, *held* that the Magistrate was justified in issuing a warrant for the arrest of the woman—18 A L J 1149

Clause (b)—Proof of service of summons —A report by the station writer that he served the summons is no evidence of service of summons under clause (b) of this section—3 L B R 116

Bail —A Magistrate is competent to admit to bail a recalcitrant witness arrested under this section—2 Weir 39

91 When any person, for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court

Power to take bond for appearance

Bond by Mukhtear —A bond by a mukhtear by which the mukhtear undertook to produce a witness when called upon was held to be sufficient although no security for appearance had been taken from the witness herself—21 A W N 35

Power to lock up —Even though a Magistrate may suspect that the witness who is present may in future be kept out of the way by the accused still it will not justify the Magistrate in arresting the witness and placing her in the lock up—21 A W N 35

92 When any person who is bound by any bond taken under this Code to appear before a Court, does not so appear, the officer presiding in such Court may issue a warrant directing that such person be arrested and produced before him

Arrest on breach of bond for appearance
 Scope —Sec 92 has reference to the case of a person who is bound by a bond to appear in Court, and does not apply to a case where prior to the time for appearance, arrest by warrant is sought to be effected—
 35 Mad 1068

93 The provisions contained in this Chapter relating to a summons and warrant, and their issue service and execution, shall, so far as may be, apply to every summons and every warrant of arrest issued under this Code

CHAPTER VII

OF PROCEEDINGS TO COMPEL THE PRODUCTION OF DOCUMENTS AND OTHER MOVEABLE PROPERTY, AND FOR THE DISCOVERY OF PERSONS WRONGFULLY CONFINED

A.—Summons to produce

94 (1) Whenever any Court, or in any place beyond the limits of the towns of Calcutta and Bombay any officer in charge of a police-station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it at the time and place stated in the summons or order

Summons to produce document or other thing

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same

(3) Nothing in this section shall be deemed to affect the Indian Evidence Act, 1872, sections 123 and 124, or to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the Postal or Telegraph authorities

Document —This section deals with documents forming the subject of a criminal offence as also with documents which are or can be used only as evidence in support of a prosecution—5 Bom L R 980

Court —It was held in 12 C W N 973, 36 Cal 433, and 22 Bom 949 that if there were no proceedings pending before a Magistrate he was not a 'Court' within the meaning of this section. But the Privy Council case of 39 Cal 953 has laid down that the words 'Court' and 'Magistrate' are controvertible terms, and that Sch V Form VIII contemplates the issue of a search warrant before any proceedings are initiated

Duty of Court —Before the Magistrate can order for the production of any document, he must judicially consider whether the production of the document is necessary or relevant for the purpose of the trial—5 Bom L R 980

'Necessary or desirable' —The Magistrate cannot call for anything and everything from any body and everybody. The document or thing called for must have some relation to or connection with the subject matter of the investigation or the enquiry, or throw some light on the proceeding, or supply some link in the chain of evidence—19 Cal 52. It must be something the production or inspection of which is necessary or desirable or will serve the ends of justice—1914 P R 36. Before a person can be punished for the non production of a document it is necessary to show that its production was material for the decision of the case in which the document was called for—19 Cr L J 217 (Pr). A document is a necessary document even though it is necessary as a mere piece of evidence only—5 Bom L R 980

It may be that the thing called for may turn out to be wholly irrelevant to the enquiry but so long as it is considered to be necessary or desirable for the purpose of the enquiry, the power is there—19 Cal 52

Whether the documents are necessary for the enquiry is a matter to be decided by the Magistrate at the time of issuing a summons under this section or a search warrant under Sec 96—15 Cal 109

Person in possession —The person called upon to produce need not be a party to the proceedings. The Magistrate can order the production of things in the possession of the solicitor—19 Cal 52

Person whether includes accused —The provisions of this section apply to an accused, and it is competent for the Magistrate to issue summons to an accused to produce a document or other thing, the production of which might incriminate him—37 Mad 112 15 Cal 109, 19 Cal 52. The Magistrate has the power of issuing search warrants under Sec 96 to obtain documents in possession of the accused (41 Cal 261) and the issue of summons is a milder means of attaining the same end—37 Mad 112. Contra—12 C W N 1016

Order for production —*Inspection* —The Magistrate can order for production in Court, he cannot allow the prosecution to inspect the entries in the account book, kept by the accused in the solicitor's office. They must be first produced in Court where they can be inspected—5 Bom L R 978

Putting it in evidence —On production of a document, the accused has no right to insist upon the prosecution putting it in evidence. The prosecution is entitled to determine whether it is to be put in evidence or not—15 Cal 109, 5 Bom L R 980

Security for production —When a Magistrate thinks that there are articles in a person's possession the production of which is necessary, he can issue a summons under this section or a search warrant under sec 96, there is no section to enable him to demand security from the person for the production of the articles when required—7 C W N 522

Lien —The mere fact that the person in possession of the articles has a lien over them does not affect the power of the Magistrate to order their production—19 Cal 52

Punishment —Omission to produce the document or thing is punishable under sec 175 I P C

95 (1) If any document, parcel or thing in such custody is, in the opinion of any District

Procedure as to letters
and telegrams

Magistrate, Chief Presidency Magistrate,

High Court or Court of Session, wanted for the purpose of any investigation, inquiry, trial or other proceeding under this Code, such Magistrate or Court may require the Postal

or Telegraph authorities, as the case may be, to deliver such document, parcel or thing to such person as such Magistrate or Court directs.

(2) If any such document, parcel or thing is, in the opinion of any other Magistrate or of any Commissioner of Police or District Superintendent of Police, wanted for any such purpose, he may require the Postal or Telegraph Department, as the case may be, to cause search to be made for and to detain such document, parcel or thing pending the orders of any such District Magistrate, Chief Presidency Magistrate or Court.

Production of Post office record before Courts —The attention of all Civil and Criminal Courts in the Provinces of Bengal and Eastern Bengal and Assam is invited to the following departmental instructions, which the Director General of Post Office, with the approval of the Government of India, has issued for the guidance of Postmasters on the subject of the production of Post Office Records before Courts —

"A summons from a Court of Civil or Criminal jurisdiction to produce any of the records of a Post Office or a certified extract from or copy of any such records must be complied with. The receipt of such a summons and such particulars as are known to the Post Master regarding the case, should be at once reported to the Post Master General in case he should see fit to raise any objection in Court under secs 123 and 124 of the Indian Evidence Act I of 1872 to the production of any of the records. When any journal or other record of a Post Office is produced in Court and admitted in evidence, the Officer producing it shall ask the Court to direct that only such portions of the record as may be required by the Court shall be disclosed"—Cal G R and C. O p 7

B—Search-warrants

96 (1) Where any Court has reason to believe that a person to whom a summons or order under section 94 or a requisition under section 95, sub-section (1), has been or might be addressed, will not or would not produce the document or thing as required by such summons or requisition,

or where such document or thing is not known to the Court to be in the possession of any person,

When search warrant may be issued

or where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection,

it may issue a search-warrant; and the person to whom such warrant is directed, may search or inspect in accordance therewith and the provisions hereinafter contained.

(2) Nothing herein contained shall authorize any Magistrate other than a District Magistrate or Chief Presidency Magistrate to grant a warrant to search for a document, parcel or other thing in the custody of the Postal or Telegraph authorities

Conditions precedent—Duty of Magistrate —

(a) Before issuing the search warrant the Magistrate must have before him some information or evidence that the document is necessary or desirable for the purposes of the inquiry before him—9 L B R 45

(b) The Court issuing the search warrant must have reason to believe that the person against whom the search warrant is issued is not likely to produce the document or thing in his possession in pursuance of a summons or order under section 94 or a requisition under section 95 (1) of this Code—5 Bom L R 1032 The issue of a search warrant is a *judicial act*, and it is the duty of the Magistrate before issuing such warrant to satisfy himself by inquiry that *summons may not have the desired effect* Where without such inquiry, the Magistrate issued a search warrant on the mere application of the complainant, the order was *ultra vires*—1917 M W N 494, 1916 P W R 12

(c) A search warrant ought to be issued only after judicial inquiry and on proper materials—15 Cal 109, 8 W R 74, 22 Bom 949 Of course, it is not obligatory on a Magistrate to wait until a preliminary inquiry is held and all the witnesses for the prosecution are examined and cross examined, the Magistrate is entitled to act upon information which he considers credible, provided that there is a complaint before him and the complainant is examined by him on oath or solemn affirmation—13 Mad 18, 8 M L T 416 If the Magistrate is about to issue a search warrant on the strength of information as distinguished from a complaint, the Court should, if feasible, examine the informant on oath and if evidence cannot be taken on oath the Court should act with a due appreciation of the fact that it is taking upon itself the responsibility of considering the weight of the information as information preparatory to the issue of an order of a very serious nature involving the invasion

and search of a man's house—8 A L J 517. A telegram received by the Police is not a good ground for issuing a search warrant—22 Bom 249

The provision of the law requiring the sanction of a Magistrate before the issue of a search warrant means that the Magistrate should apply his mind to the facts and ought not to issue a search warrant simply because a Police officer asks him to do so. When there is no inquiry or trial or other proceeding under the Code, a general search warrant cannot be issued under this section. Thus, in the course of an investigation which was being made by a Police officer appointed by the Government to inquire into the dealings with the Munitions Board a petition was presented by that officer to the Chief Presidency Magistrate of Calcutta stating that certain offences appeared to have been committed in connection with the dealings with the Munitions Board and praying for a search warrant against the firm of one T R Pratt. There was nothing in the petition to connect T R Pratt with those offences. It was held that there were no materials before the Magistrate on which he could decide that a search warrant should be issued—47 Cal 597. An order under this section cannot be made to further a police investigation which may or may not result in an inquiry. The Magistrate is to form his own opinion upon the materials placed before him. He is not relieved from his duty by stating that he believed that the officer holding the investigation for the purposes of which the documents or things were required had formed a correct opinion—24 C W N 405

Record—Although there is no express provision requiring the Magistrate to make a record or keep notes of the examination of the person on whose application he issues the search warrant, some record ought to be kept to enable the High Court to form an opinion as regards the materials upon which the Magistrate acted—24 C W. N 405

Object of Search warrant—The production of a property in the hands of third parties can only be sought for the purpose of *evidence*, and a search warrant ought not to be granted for the sole purpose of attaching property the title to which is in dispute—Ratanlal 677

Again, a search ought not to be conducted for *fishing out evidence*. This section contemplates the production of a specified or distinct thing, and for that purpose a specified house or place may be searched. It does not empower police officers to make harassing searches and to seize any papers under the bare chance of finding something tending to conviction—9 W. R 75 9 L B R 45

Court —It means Magistrate 'Court' and Magistrate' are convertible terms, and it is not necessary that the Magistrate in order to issue a search warrant should sit as a *Court*, or that some proceeding should have been initiated before him—39 Cal 953 (P C) overruling 36 Cal 433

Person —The word 'person' includes the accused—1914 P R 36
A search can be made for a stolen article or incriminating document in the possession of the accused person—41 Cal 261

Who can make the search —The Magistrate who is competent to issue a search warrant is also competent to conduct the search himself—Sec 105, 4 A W N 213, 36 Cal 433, 39 Cal 953 (P C)

Only specific articles can be searched —The search must be for a *specific* article or thing and not for stolen property *generally*—41 Cal 261
The law does not authorise a search for anything but specified articles which have been or can be made the subject of summons or warrant to produce—16 C W N 1078 9 L B R 45

The warrant is intended for use in respect of defined documents believed to exist, which must be clearly specified in the warrant, and therefore where a Magistrate issued a search warrant for the search and seizure of all letter books letters, bills and books of account in a man's house for the purpose of inquiry as to whether he had used or sold articles with a counterfeit trade mark it was held that the issue of such a search warrant was a gross perversion of the law—9 L B R 45 1916 P W R 12
Power of issuing a search warrant is not intended to be used for the purpose of giving complainants an opportunity of fishing for evidence—*Ibid*

Extent of search —In taking act on under this section, the Court is authorised to go as far as is physically possible in the search. The accused can perhaps defeat the Court by concealing or destroying the document but the mere fact that the accused can so defeat or thwart the Court is no reason for holding that the Court is debarred from going as far as the section specifically allows—1914 P R 36
The Magistrate has power to issue a search warrant for the production of copies of the infringing book, proofs, plates, printed and set up matters, together with letters and orders with reference to the book, for the purpose of making an order under section 10 of the Copyright Act—47 Cal 164

Taking possession —Power to search given to this section includes also the power to take possession of the document or thing—15 Cal 109 Ratanlal 677

Inspection —When a document is seized and brought before the Court, the party at whose instance it was produced has a right to inspect the document so produced—5 Bom L R 930, but he is not entitled to

examine it all ; *e g* in case of account books, the Court should restrict the examination to the particular book or portions of book relating to the subject matter under enquiry or trial—15 Cal 109

Seizure without search warrant —An order of the Magistrate to seize certain account books without issuing a summons under Sec 94 or warrant under this section is illegal—38 Cal 68

Search warrants when to be executed —A search warrant should be executed between sunrise and sunset. If for special reasons it is executed between sunset and sunrise, such reasons must be reported to the D S P for the information of the Magistrate—Bengal Police Manual, 2nd Ed p 402

Issue of search warrant must be prompt —Where in a case of criminal trespass and theft the complainant at the time of applying for process prayed for the issue of a search warrant, but the Magistrate after repeated applications made an order for the issue of the warrant more than three weeks after, it was held that although the procedure was not contrary to the actual letter of sections 96 and 98, still it was so dilatory that it could only tend to defeat the very object for which such a warrant was issued—22 C W N 719

Stay of execution of warrant on security —Where the person against whom a search warrant was issued prays for the stay thereof and offers an undertaking not to sell copies of the infringing books but to produce them before the Court whenever required, the Magistrate has jurisdiction to stay execution of warrant conditionally on the execution of a bond to produce the copies in Court—47 Cal 164. But in an earlier case of the same High Court it has been held that the Magistrate can either issue a summons under sec 94 or a search warrant under section 96, but there is no section of the Code which enables him to demand security for the production of the thing in Court when required—7 C W N 522

97. The Court may, if it thinks fit, specify in the warrant the particular place or part thereof to which only the search or inspection shall extend, and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified

Power to restrict warrant.

98 (1) If a District Magistrate, Sub divisional Magistrate, Presidency Magistrate or Magistrate of the first class, upon information and after such inquiry as he thinks

Search of house suspected to contain stolen property, forged documents, etc

necessary, has reason to believe that any place is used for the deposit or sale of stolen property,

or for the deposit or sale or manufacture of forged documents, false seals or counterfeit stamps or coin, or instruments or materials for counterfeiting coin or stamps or for forging,

or that any forged documents, false seals or counterfeit stamps or coin, or instruments or materials used for counterfeiting coin or stamps or for forging, are kept or deposited in any place,

he may by his warrant authorize any police officer above the rank of a constable—

- (a) to enter, with such assistance as may be required, such place, and
- (b) to search the same in manner specified in the warrant, and
- (c) to take possession of any property, documents, seals, stamps or coins therein found which he reasonably suspects to be stolen, unlawfully obtained, forged, false or counterfeit, and also of any such instruments and materials as aforesaid, and
- (d) to convey such property, documents, seals, stamps, coins, instruments or materials before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose thereof in some place of safety, and
- (e) to take into custody and carry before a Magistrate every person found in such place who appears to have been privy to the deposit, sale or manufacture or keeping of any such property, documents, seals, stamps, coins, instruments or materials knowing or having reasonable cause to suspect the said property to have been stolen or otherwise unlawfully obtained, or the said documents, seals, stamps, coins, instruments or materials to have been forged, falsified or counterfeited, or the said instruments

or materials to have been or to be intended to be used for counterfeiting coin or stamps or for forging

(2) The provisions of this section with respect to—

(a) counterfeit coin,

(b) coin suspected to be counterfeit and

(c) instruments or materials for counterfeiting coin,

shall, so far as they can be made applicable apply respectively to—

(a) pieces of metal made in contravention of the Metal Tokens Act, 1889 [I of 1889] or brought into British India in contravention of any notification for the time being in force under section 19 of the Sea Customs Act, 1878 [VIII of 1878]

(b) pieces of metal suspected to have been so made or to have been so brought into British India or to be intended to be issued in contravention of the former of those Acts, and

(c) instruments or materials for making pieces of metal in contravention of that Act

Secs 98 and 96 —This section is much wider than section 96 and its language is very similar to that of section 6 of the Burma Gambling Act—4 L B R 213 Section 96 contemplates the existence of judicial proceeding in the course of which alone the Magistrate can issue a search warrant but section 98 does not require a criminal proceeding as a condition precedent to the issue of a search warrant—35 Cal 1076

Any Police officer —A warrant issued under this section can be endorsed over to any other Police officer of a similar rank for execution—3 S L R 56

Search without warrant —If there is no search warrant under this section the search is illegal and the occupiers of the house have a legal right of private defence in resisting it—35 Cal 304

99 When in the execution of a search warrant at any place beyond the local limits of the jurisdiction of the Court which issued the same any of the things for which search is made, are

Disposition of things found in search beyond jurisdiction

found, such things, together with the list of the same prepared under the provisions hereinafter contained, shall be immediately taken before the Court issuing the warrant, unless such place is nearer to the Magistrate having jurisdiction therein than to such Court, in which case the list and things shall be immediately taken before such Magistrate, and, unless there be good cause to the contrary, such Magistrate shall make an order authorizing them to be taken to such Court

Power to declare
certain publications
forfeited, and to issue
search warrants for the
same

99A. (1) Where—

(a) any newspaper or book as defined in the Press and Registration of Books Act, 1867, or

(b) any document,

wherever printed, appears to the Local Government to contain any seditious matter, that is to say, any matter the publication of which is punishable under section 124A of the Indian Penal Code, the Local Government may, by notification in the local Official Gazette, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to His Majesty, and thereupon any police officer may seize the same, wherever found in British India, and any Magistrate may by warrant authorise any police-officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be

(2) In sub section (1) "document" includes also any painting, drawing or photograph, or other representation

99B Any person having any interest in any newspaper, book or other document, in respect of which an order of forfeiture has been made under section 99A, may, within two months from

Application to High
Court to set aside order
of forfeiture

or materials to have been or to be intended to be used for counterfeiting coin or stamps or for forging.

(2) The provisions of this section with respect to—

(a) counterfeit coin,

(b) coin suspected to be counterfeit, and

(c) instruments or materials for counterfeiting coin,

shall, so far as they can be made applicable, apply respectively to—

(a) pieces of metal made in contravention of the Metal Tokens Act, 1889 [I of 1889] or brought into British India in contravention of any notification for the time being in force under section 19 of the Sea Customs Act, 1878 [VIII of 1878],

(b) pieces of metal suspected to have been so made or to have been so brought into British India or to be intended to be issued in contravention of the former of those Acts, and

(c) instruments or materials for making pieces of metal in contravention of that Act

Secs. 98 and 96 —This section is much wider than section 96 and its language is very similar to that of section 6 of the Burma Gambling Act—4 L. B. R. 213. Section 96 contemplates the existence of judicial proceeding in the course of which alone the Magistrate can issue a search warrant, but section 98 does not require a criminal proceeding as a condition precedent to the issue of a search warrant—35 Cal 1076

Any Police officer.—A warrant issued under this section can be endorsed over to any other Police officer of a similar rank for execution—3 S. L. R. 56

Search without warrant —If there is no search warrant under this section, the search is illegal and the occupiers of the house have a legal right of private defence in resisting it—38 Cal 304

89. When, in the execution of a search-warrant at any place beyond the local limits of the jurisdiction of the Court which issued the same, any of the things for which search is made, are

Disposal of things found in search beyond jurisdiction

found such things together with the list of the same prepared under the provisions hereinafter contained, shall be immediately taken before the Court issuing the warrant, unless such place is nearer to the Magistrate having jurisdiction therein than to such Court in which case the list and things shall be immediately taken before such Magistrate, and, unless there be good cause to the contrary, such Magistrate shall make an order authorising them to be taken to such Court.

*Power to declare
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(2) In sub-section (1) "document" includes also any painting, drawing or photograph, or other representation

99B Any person having any interest in any newspaper, book or other document, in respect of which an order of forfeiture has been made under section 99A, may, within two months from

*Application to High
Court to set aside order
of forfeiture*

the date of such order, apply to the High Court to set aside such order on the ground that the issue of the newspaper, or the book or other document, in respect of which the order was made, did not contain any seditious matter.

99C. Every such application shall be heard and determined by a Special Bench of the High Court composed of three Judges.

Hearing by Special Bench.

99D. (1) On receipt of the application, the Special Bench shall, if it is not satisfied that the issue of the newspaper, or the book or other document, in respect of which the application has been made, contained seditious matter of the nature referred to in sub-section (1) of section 99A, set aside the order of forfeiture.

Order of Special Bench setting aside forfeiture.

(2) Where there is a difference of opinion among the Judges forming the Special Bench, the decision shall be in accordance with the opinion of the majority of those Judges.

99E. On the hearing of any such application with reference to any newspaper, any copy of such newspaper may be given in evidence in aid of the proof of the nature or tendency of the words, signs or visible representations contained in such newspaper which are alleged to be seditious matter.

Evidence to prove nature or tendency of newspapers.

99F. Every High Court shall, as soon as conveniently may be, frame rules to regulate the procedure in the case of such application, the amount of the costs thereof and the execution of orders passed thereon, and until such rules are framed, the practice of such Courts in proceedings other than suits and appeals shall apply, so far as may be practicable, to such applications.

Procedure in High Court.

99G. No order passed or action taken under section 99A shall be called in question in any Court otherwise than in accordance with the provisions of section 99B.

Jurisdiction barred.

Sections 99 A to 99 G have been added by Act XIV of 1922 (Indian Press Law Repeal and Amendment Act)

C.—Discovery of Persons wrongfully confined.

100 If any Presidency Magistrate, Magistrate of the first class or Sub-divisional Magistrate ^{Search for persons wrongfully confined.} has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined, and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.

Duty of Magistrates —When a Magistrate has an application before him containing the allegations that are required by this section, and asking him to issue a search warrant under it, it is incumbent on such Magistrate to satisfy himself by holding an inquiry that there is foundation for the application—1916 P R 34

Arrest of ward :—The powers conferred on a first class Magistrate under this section may be exercised by a District Judge in arresting a ward removed from the custody of the guardian See section 25 (3) of the Guardians and Wards Act

Wrongful confinement —The Magistrate is not bound to issue a search warrant under this section unless he has reason to believe that the confinement amounts to an offence The jurisdiction conferred by this section is not as wide as that conferred by Sec. 491—Ratanlal 839

Complaint against husband —In the case of a complaint being made against the husband that he was keeping his wife in confinement, a Magistrate cannot make a summary order, but before disposing of the proceedings, he is bound to hear both sides, and after making such enquiry as may seem necessary, he should pass such order as may seem right If he finds the confinement amounted to an offence, he should let the wife go and warn the husband against interfering with her except through a Civil Court If on the other hand, he arrives at the conclusion that such is not the case, he should advise the wife to go home with her husband, warning the husband at the same time against using any coercion in taking the wife with him—1910 P. W R 29

Form of warrant —There being no prescribed form of warrant under this section, a Magistrate who had to issue one under this section adapted a form under Sec. 96 to the provisions of this section by altering the figures, and by drawing up the warrant in terms required by this section. It was held that the warrant was perfectly legal, it being immaterial what form is used, provided that the substance of the warrant complied with the requirements of this section—45 Cal. 905

D.—General Provisions relating to Searches.

101. The provisions of sections 43, 75, 77, 79, 82, 83, and 84 shall, so far as may be, apply to all search-warrants issued under section 96, section 98, *section 99A* or section 100

Direction, etc., of search-warrants.

The words "section 99A" in this section have been added by Act XIV of 1922 (Indian Press Act Repeal and Amendment Act)

Sec. 79—Endorsement —A search warrant issued under the Gambling Act (III of 1867) is governed by the provisions of this Code, and consequently a search warrant may be endorsed by the Police-officer, to whom it is originally directed, to another of equal rank—30 All 60

102. (1) Whenever any place liable to search or inspection under this Chapter is closed, any person residing in, or being in charge of, such place shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

Persons in charge of closed place to allow search.

(2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in manner provided by section 48

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched. If such person is a woman, the directions of section 52 shall be observed

Searches under other Acts —According to Sec. 6 of the Burma Gambling Act, all searches made under that section of that Act must be made in accordance with the terms of sections 102 (3) and 103

of this Code—3 L B R 229, 4 L B R 134 Section 16 of the Opium Act lays down that searches under Secs 14 and 15 of that Act shall be made in accordance with the provisions of this Code—4 L B R 121

But the Gambling Act (III of 1867, sec 5) prescribes a special procedure for searches under that Act, and the provisions of Chapter VII of the Criminal Procedure Code will not apply thereto—3 Lab 359

103 (1) Before making a search under this Chapter, the officer or other person about to make
Search to be made in presence of witnesses it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search *and may issue an order in writing to them or any of them so to do*

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses, but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it

(3) The occupant of the place searched or some person
Occupant of place searched may attend in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses shall be delivered to such occupant or person at his request

(4) When any person is searched under section 102, sub section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person at his request

(5) *Any person who without reasonable cause refuses or neglects to attend and witness a search under this section when called upon to do so by an order in writing delivered or tendered to him shall be deemed to have committed an offence under section 187 of the Indian Penal Code*

The italicised words have been added by sec 14 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

Witnesses —It is obligatory on the officer about to execute a search warrant to call on and get two or more respectable inhabitants of the locality to witness the search, before he enters the place to be searched—4 L B R 213 The witnesses are to be selected by the officer conducting the search and not by any other person—21 Mad 83

The regularity and proper conduct of the search is to be secured by two or more witnesses, the intention of the enactment is to ensure that searches are conducted with decency and in order, and that no wrong doing such as 'planting' of articles by the Police in the house searched should take place—4 L B R 213, 3 L B R 229, and that no false evidence may be fabricated—3 Bur L T 143

Persons unconnected in any way with the Government and officialdom should be called to witness the search—3 L B R 229 Therefore a Teahouse Goung in Burma is not a competent witness to a search as he is a police officer—12 Bur L T 269, so also, the Headmen of Wards in Rangoon being appointed by the Commissioner of Police and having to do many Police duties, it is not advisable that witnesses should be chosen from that class, as being Police officials they are not likely to have the confidence of men—4 L B R 213 In 7 Bur L T 143, it is held that Ward Headmen of towns other than Rangoon are competent witnesses before a search

It is objectionable to be constantly calling the same person to witness the search, because such a practice is likely to prejudice the mind of the trying Magistrate against the prosecution—4 L B R 121

Search without witness —The fact that a search is attempted to be made without the presence of witnesses does not justify obstruction and resistance on the part of any person. Such obstruction or resistance will make him liable to conviction under Sec. 353 I P C—19 Mad 349

Respectable inhabitants —Only those persons should be chosen as witnesses who can be reasonably relied on to secure the desired result (viz prevention of fabrication of evidence, and decent and orderly conduct on the part of the officers conducting the search) and in whose trustworthiness and ability towards the carrying out of the particular duty required of them confidence can be felt—4 L B R 213, 3 Bur L T 143 The intention of the Legislature is to exclude from the category of inhabitants those persons in whom confidence cannot be felt and against whom a reasonable suspicion exists that they may not carry out the duty required of them—

A respectable person is a person who would be *impartial* and on whom the owner or occupier of the premises searched can *prima facie* rely—7 Bur L. T. 143 The word 'respectable' means 'respectable and independent'—4 Bur L. T. 91 (following *Rex v Hall*, 1 B & C 123), 23 Cr L. J 609 (Lah).

"Of the locality" —For the purposes of this section a person living in a quarter within part of the place to be searched may reasonably be regarded as an inhabitant 'of the locality', even if a river flows between—3 Bur L. T. 143 The word 'locality' in this section does not mean the same quarter of the town as the place which is to be searched—4 Bur L. T. 222 Where the witnesses lived in a quarter exactly half a mile west of the house searched in Rangoon, *held* that the witnesses lived within easy reach and the same locality within the meaning of this section—18 Cr L. J 1009 (Bur)

But the fact that the witnesses are not men of the locality is immaterial if they are 'respectable' men. The important point is that the men called in as witnesses should be persons of some standing whose word can be believed, not that they should be persons living within a stone's throw of the house which is to be searched The stress is on the word 'respectable' and not on the word 'locality'—3 Bur L. T. 143, 18 Cr L. J 1009 (Bur)

But the intention of the Legislature is to lay equal stress on the words 'respectable' and 'locality' or rather to lay more stress on the word 'locality', for the *Report of the Select Committee* of 1916 runs as follows — 'We think that the power thus given to the police, practically to compel the attendance of respectable witnesses from as near as possible to the place where the search is to be effected, should go far to put an end to the objectionable practice of bringing semi professional search witnesses from a greater distance, and will also prevent the frustration of searches by the unreasonable refusal of witnesses to attend, which, we understand, is by no means uncommon If executive instructions are issued to the police that, with this new sub section (5) to back them, they are, whenever possible, to require the attendance of respectable witnesses from the *immediate* vicinity, we think that a considerable improvement will be effected'.

Right of occupant to be present —The spirit of subsection (3) is that the occupant of the place shall be present and it means that he is to be given the option of being present, and not that he is to be allowed to be present only if he demands it This section permits the occupants of the search to be present at the search, and this rule is not one merely of technicality but of substance, in that it is enacted to guarantee the

reality of the search and the discoveries made thereat. Therefore where the accused persons, who were inside the room searched by the Police, were after the discovery in their presence of a gun and after search of their persons, sent out of the room, and the search was continued, it was held that there was a violation of the rule enunciated in this subsection—41 Cal 350

The word 'occupant' is not intended to cover every person who may happen to be in the place at the time, but it refers back to the person mentioned in sec 102, i.e. a person residing in or being in charge of the place—41 Cal 350

Search list —A search list prepared under this section is a proper evidence as to the matter contained therein, viz, the articles found and the place where they were found—2 Weir 47

After a search list has been prepared and signed, it is not proper to make additions thereto subsequently, but such additions however will not invalidate the whole search, nor is the omission of unimportant articles a circumstance invalidating the search—7 Bur L T 163

But it is competent for the Court to receive evidence other than the search list regarding the things seized in course of the search and the places in which they were found—34 Mad 349 (F B) overruling 2 Weir 515

Non signing of search list —Refusal by a witness to sign the search list is not punishable under section 187 I P Code (intentional omission to assist a public servant in the execution of his duty) because the 'assistance' referred to in sec 187 I P C must have some direct personal relation to the execution of the duty by the Police officer. The signing of the list is an independent duty cast upon the witness whereas the word 'assistance' in sec 187 I P C implies that the party who assists is doing something which in ordinary circumstances the party assisted could do for himself—26 Mad 419

In 41 B P 134 it has been laid down that unless the search list is signed by witnesses, the search would not be legal. But a more reasonable view has been taken in 34 Mad 349 cited above. The Privy Council also holds that the nonsigning of the list by the witnesses does not *ipso facto* vitiate the trial and the conviction of the accused—2 P. L. T 359

In the Bill of 1914 it was proposed to add another subsection (6) to this section as follows —'The fact that any person so attending neglects or refuses to sign the list of the articles seized shall not affect the legality of the search. But this was thought unnecessary and omitted by the Select Committee of 1916 who observed as follows 'We doubt if it

would be wise to enact the new sub section (6) proposed by the Bill, and we recommend that it should be omitted. We think that it will be sufficient to rely upon the law as expounded recently by the Full Bench in Madras (1 L R 34 Mad 349) which shows that the facts with reference to a search may be proved otherwise than by the production of the search lists '.

Duty of prosecution to summon search witnesses —The prosecution is in duty bound to call search witnesses at the trial, unless it is of opinion that they would misrepresent facts and would misstate what happened. The fact that the prosecution thought that these persons had formed an opinion unfavourable to the prosecution story regarding the search is no reason why those persons should not be called by the prosecution, in as much as what these persons would be required to state in their deposition was what they observed and not what they thought—9 C W N 438

Search witnesses whether bound to attend Court —Subsection (2) of this section suggests that while the rendering of assistance in making the search is imperative on the persons called upon to assist, they are not compellable by the Inspector to attend the Court to give evidence without a summons in that behalf—38 M L J 27

Refusal to attend and witness search —If a person who is requisitioned by a Salt Inspector to assist him in the search made under this section, refuses to attend and witness the search, he is punishable under sec 187 I P C—38 M L J 27

But the new subsection (5) now adds a further condition namely that an order in writing must have been tendered to the person requisitioned to attend the search. We accept the proposal of the Bill to penalise an unreasonable refusal or neglect to attend as a search witness, but would make it a condition precedent that the person in question should have been required to attend by an order in writing from the police officer. In order to make this clear we have, in addition to the new sub section (5), made a small amendment at the end of sub section (1) —*Report of the Select Committee of 1916*

E — Miscellaneous

104 Any Court may, if it thinks fit, impound any document or thing produced before it under this Code

Power to impound document etc. provided

'Before it' —A Magistrate can impound a document produced in a case pending before him, and not before any other Magistrate subordinate to him—1 A L J 607

Jurisdiction —Where a Magistrate had no jurisdiction to summon a person to produce his account books, this section does not apply so as to justify his sending the books out of his jurisdiction—Ratanlal 880

Procedure —A note upon the document or thing impounded or attached to it should be made and signed by the presiding officer and it should not be allowed to pass out of the custody of the Court except by his written order—All H C Bk Cir, p 6

105 Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search-warrant

Magistrate may direct search in his presence When the Magistrate is competent to issue a search warrant, then instead of issuing such a warrant he can direct the search to be made in his presence—36 Cal 433, 4 A W N 213

such Court may, at the time of passing sentence on such person order him to execute a bond for a sum proportionate to his means, with or without sureties, for keeping the peace during such period not exceeding three years, as it thinks fit to fix

(2) If the conviction is set aside on appeal or otherwise, the bond so executed shall become void

(3) An order under this section may also be made by an Appellate Court or by a High Court when exercising its powers of revision

such Court may, at the time of passing sentence on such person, order him to execute a bond for a sum proportionate to his means with or without sureties, for keeping the peace during such period, not exceeding three years as it thinks fit to fix

(2) If the conviction is set aside on appeal or otherwise the bond so executed shall become void

(3) An order under this section may also be made by an Appellate Court *including a Court hearing appeals under section 407* or by the High Court when exercising its powers of revision

Change —The words 'or of assembling armed men or taking other unlawful measures with the evident intention of committing the same' which occurred in sub section (1) of the old section after the words 'abetting the same' have been omitted and the italicised words have been added, by sec 15, of the Criminal Procedure Code Amendment Act (XVIII of 1913)

Object of this Chapter —The object of this Chapter is the prevention and not the punishment of offences and its provisions are aimed at persons who are a danger to the public by reason of the commission by them of certain offences—11 B I R 43, 1885 P R 43. This chapter gives a certain amount of discretion to the Magistrates and the High Court must always be slow to interfere with that discretion unless there is an error of law—6 B I R 31, 1 C I R 268. But the Magistrate should exercise this preventive jurisdiction under this chapter with cautious discrimination and watchful care and see that the administration of this branch of Criminal law does not become harsh and oppressive—L B I (1893—1900) 222.

Offences under Chap VIII, IPC —In the Bill of 1914, it was proposed to include in this section not only the offences which involve a breach of the peace but also offences which are *likely* to lead to a breach of the peace. But on the recommendation of the Select Committee which sat on that Bill in 1916, it was proposed by the Bill of 1921 to include in this section all the offences falling under Chapter VIII of the Indian Penal Code. The Select Committee observed "We think it is better to enlarge the scope of this section by including all offences under Chapter VIII of the Penal Code than to involve the Court in an inquiry whether the offence of which the accused has been convicted, though not involving a breach of the peace, was nevertheless likely to have occasioned a breach". In 1922 the Joint Committee made an exception in the case of sec 153A of the Penal Code, and during the debate in the Legislative Assembly, three more sections, namely 143, 149 and 154 were excepted.

The offence of assembling armed men is an offence under Chapter VIII of the I P Code, therefore this section applies where armed men were assembled with the intention of committing a breach of the peace and an order for beating men was given, although no breach of the peace actually took place because the assembly did not go so far—5 C W. N. 250. So also, the offence of being an armed member of an assembly (sec 144 I P C) or joining such assembly (sec 145 I P C) is an offence under Chapter VIII of the I P Code and brings an accused under this section. The cases of 1890 P R 3 and 1910 P L R 126 in which the contrary view was held are no longer good law.

A security can be demanded on the conviction for an offence under sec 147 I. P. C—20 Cr L J. 760 (Nag)

'Other offence involving breach of the peace' —These words refer to offences in which a breach of the peace is an essential ingredient, and not to offences which merely provoke or are likely to lead to a breach of the peace—30 Cal 366, 29 Mad 190, 4 M L T 468, 2 Lah 279.

But according to the Bombay High Court the words 'other offence . . . peace' cover two classes of cases. The first class of the case is where there has been actually a breach of the peace, the other class is where the definition of the offence involves a breach of the peace, i.e. the phrase includes offences which are offences because a breach of the peace *has* occurred or because a breach of the peace is *likely to occur*. And therefore when an accused person, being convicted of an offence punishable under sec 504 I. P. C (insult with intent to provoke a breach of the peace) was ordered to furnish security to keep the peace, it was held that the order was lawful, in as much as a breach of the peace or

order under this section—21 W. R. 12, 2 C. L. R. 348. If a second class or third class Magistrate is of opinion that the accused should be bound down under this section, he must refer the whole case to a superior Magistrate without passing any sentence himself—35 Cal. 1093.

A Magistrate of the second class who is also a Sub Divisional Magistrate can pass an order under this section binding over a person to keep the peace for a period exceeding six months—37 All. 230.

"Such Court" —*Only convicting Magistrate can pass order* —The conviction and order for security must be made by one and the same officer. Where a third class Magistrate convicted the accused and further submitted the case to the District Magistrate with a recommendation that the accused should be bound over to keep the peace, and the District Magistrate ordered security under this section, the order was *ultra vires* and illegal—21 Cal. 622. See also 35 Cal. 1093 cited above.

'May order' —The taking of security for keeping the peace is a matter within the discretion of the Magistrate, provided he has materials with which to proceed—23 W. R. 38.

"At the time of passing sentence" —The order for security is to be made at the time of passing the sentence. Where a second class Magistrate convicted a person for assault and sentenced him to a fine, but ordered the sentence to be in abeyance pending the order of the District Magistrate for binding over the person, and the District Magistrate set aside the fine but ordered the accused to furnish security, it was held that the order of the District Magistrate was bad in law, because the order can be made only at the time of passing sentence by the original Court, or on confirmation of sentence by the Appellate Court—1901 P. R. 22. An order for recognizance or for security under this section must be passed at the time of deciding the original case. If no such order is then made, subsequent proceedings must be taken under section 107, and the parties summoned to show cause—15 W. R. 56. If a Magistrate omits to order the accused to furnish security under this section at the time of passing the sentence, he cannot afterwards upon receiving some further information (other than that which he derived from the previous trial) that the parties are likely to commit a breach of the peace, pass an order under this section—3 N. W. P. H. C. R. 96.

Order for security :—The object of taking a security bond for keeping the peace is not to obtain money for the Crown but to prevent crime—36 Cal. 562.

Who can be bound down —Only the accused person can be asked to give security. Under this section a Magistrate is not authorised to demand security from the complainant (in a case under sec. 323 I. P. C.) If he considers it necessary to demand security from the complainant, he must

record a separate proceeding and give the complainant an opportunity to be heard under Secs 117 and 118—1902 P R 3 Again, the Magistrate is not competent to take security from a witness for the defence on the ground that his evidence in the trial proved that he was one of the rioters—5 Mad 380 See also notes under 'such person' in Sec 107

Order must be in presence of accused —An order under this section can only be made in the presence of the accused An order made at the instance of the prosecutor, behind the back of the accused, is bad in law—3 B H C R 1

Security for good behaviour —The security ordered under this section must be for *keeping the peace* An order for furnishing security for *good behaviour* under this section is bad in law, especially when such order was passed not by the convicting Magistrate but by the District Magistrate affirming the conviction—16 A L J 280

Imprisonment in default of security —It should be simple—L B R (1893—1900) 630 See sec 123 (6)

When a substantive punishment has been awarded, and an order for security is also made the Magistrate cannot at the same time pass an order for imprisonment in anticipation of default of furnishing security—4 L B R 205 See notes under sec 123

Security in lieu of other sentence —The security must be *in addition* to an award of punishment, therefore a Magistrate cannot order security *in lieu* of other punishment—1901 P R 22

'Proportionate to his means' —The provision for taking security being a preventive measure, intended to preserve future good conduct, it should not be made an instrument of punishment by demanding excessive security disproportionate to the means of the person and thus making him undergo further imprisonment—16 Bom 372, 2 Cal 184, 20 A W N 204 1 C L R 268 2 Cal 110 6 Cal 14 1901 P R 28, 1900 P R 17, 1883 P R 1 1890 P R 30 22 W R 74 19 W R 1 4 M H C R 47

Cases when order should not be made —An order for security should not be made when a sentence of transportation or imprisonment for a long time is passed—5 L B R 34 or when such an order would prevent the party bound down from exercising his lawful rights—11 C W N 1128, thus where upon the complainant trying to take possession of land in the possession of the accused, the latter used more force than was necessary to prevent the complainant from taking possession, and the accused was punished for rioting, it was held that he should not be bound down under this section as such order would have the effect of preventing his resisting any further attempt by the complainant to take possession of his land—11 C W N 840

In 11 C. W. N. 176, it has been held that if it is necessary, in order to prevent a breach of the peace, to bind down the party entitled to possession, and if the effect of such order is to prevent him from taking possession of the property, it is desirable that the other party should also be bound down under sec. 107.

An order should not be made under this section when there are *bona fide* disputes about land or water, in which case proceedings will have to be taken under sec. 145, and not under this section—3 C. W. N. 297; 3 C. W. N. 463.

Sub section (3)—Power of Appellate Court to direct security—This sub section which was enacted at the general revision of the Code in 1898, follows the decision in 4 All. 212, and supersedes 16 Cal. 779.

The italicised words in this sub section recently added by the Amendment Act of 1923 have removed the conflict of opinion which existed between the several High Courts as to whether an Appellate Court could direct security where the original Court (*e.g.* 2nd or 3rd class Magistrate) was not empowered to pass the order. "It has been held in some cases that an Appellate Court cannot pass an order under sub section (3) unless the person convicted has been sentenced by a Court not inferior to that of a first class Magistrate. This result does not appear to have been intended, and it is proposed to remove the restriction"—*Statement of Objects and Reasons* (1914).

Thus, it has been held by the Madras, Bombay, Allahabad and Patna High Courts, as well as in Oudh and Burma, that an Appellate Court can pass an order under this section, although the original Court was not competent (*e.g.* a 2nd class or 3rd class Magistrate) to pass the order—37 Mad. 153 (overruling 29 Mad. 190 and 30 Mad. 48), 30 Mad. 182, 43 All. 372; 33 All. 48; 33 Bom. 33, 2 P. L. J. 21; 23 O. C. 380, 16 O. C. 281 (overruling 10 O. C. 287); U. B. R. (1897—1901) Vol. I, page 9 (revision). The word 'also' in sub section (3) plainly implies that the order may be independently made by an Appellate Court or by a Court of Revision in addition to those mentioned in sub section (1), and it is not implied that the power of the original Court should in any way control or limit those of the Appellate or Revisional authority—31 Bom. 33.

The Calcutta and Punjab Courts have, however, held that where the original Court was not competent to order security under this section, the Appellate Court could not exercise such powers—35 Cal. 414, 19 Cr. L. J. 220 (Cal.), 1905 P. R. 21, 1907 P. R. 6, 1918 P. R. 5, 23 Cr. L. J. 457 (Lahore).

In view of the present Amendment, the Calcutta and Punjab decisions are rendered obsolete.

An Appellate Court can require the accused to furnish security, even after the working out of the substantive punishment passed by the original Court and such an order would not amount to an enhancement of punishment under sec 423 (3) (b)—1925 P R 21, 20 Cr L J 760 (Nag)

An Appellate Court can cancel an order of security passed by the original Court, while upholding the sentence—30 Cal 101 But if the conviction and sentence are cancelled, the order of security is also cancelled See sub-section (2)

Finding by the Appellate Court—Before an Appellate Court can pass an order under this section there must be an *express finding* by that Court that the accused had committed an offence within the terms of this section a mere confirmation of the sentence passed by the original Court without such finding, is not enough to justify the order—29 Cal 393, 30 M L T 348

Juvenile offenders—Where a juvenile offender is sentenced to whipping for causing hurt with dangerous weapon the Magistrate should not pass an order under sec 31 of the Reformatory Schools Act directing delivery of the boy to his parents on their furnishing security, but should proceed to take security under this section—3 L B R 30

B—Security for keeping the Peace in other Cases and security for Good Behaviour

107 (1) Whenever a Presidency Magistrate, District

Security for keeping the peace in other cases

Magistrate, Sub divisional Magistrate or Magistrate of the first class is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity, or to do any wrongful act that may probably occasion a breach of the peace, or disturb the public tranquillity, the Magistrate, *if in his opinion there is sufficient ground for proceeding*, may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix

(2) Proceedings shall not be taken under this section unless either the person informed against or the place where

the breach of the peace or disturbance is apprehended, is within the local limits of such Magistrate's jurisdiction, and no proceedings shall be taken before any Magistrate, other than a Chief Presidency or District Magistrate, unless both the person informed against and the place where the breach of the peace or disturbance is apprehended, are within the local limits of the Magistrate's jurisdiction

(2) When any Magistrate not empowered to proceed under sub section (1) has reason to believe that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity, and that such breach of the peace or disturbance cannot be prevented otherwise than by detaining such person in custody, such Magistrate may, after recording his reasons, issue a warrant for his arrest (if he is not already in custody or before the Court), and may send him before a Magistrate empowered to deal with the case, together with a copy of his reasons

(4) A Magistrate before whom a person is sent under sub-section (3) may in his discretion detain such person in custody pending further action by himself under this chapter

Change — The italicised words have been added by sec 16 of the Criminal Procedure Code Amendment Act (XVIII of 1923). The words 'until the completion of the inquiry hereinafter prescribed' previously occurring in sub section (4) have been substituted by the words 'pending further action by himself under this chapter'. The reasons have been thus stated: 'We also recommend an amendment of section 107 (4), as we think that the powers conferred by the sub-section as it stands are unnecessarily wide. We think that it will be sufficient if the Magistrate should have power to detain the accused not only pending further action by himself under this Chapter, and we have made this change' — *Report of the Select Committee of 1915*

The words 'if it is upon a proceeding which has not occurred in either of the Bills of 1911 and 1913' have been added during the debate in the Legislative Assembly. For reasons see below

Sections 106 and 107 —Under section 106 the order can be passed only where there has been a conviction for the offences specified therein, whereas under section 107 formal proceeding has to be taken, as in summary cases, for proving that it is necessary for keeping the peace that the person summoned should execute a bond. Under section 106, the Magistrate has adjudicated in the presence of the person to be bound over, and facts are established to require security, because the accused has already been convicted, whereas under sec 107 the Magistrate has to proceed on the information the value of which must be tested in the presence of the person concerned who should also have an opportunity to show that it is not reliable—3 C L R 72

Object of section —The object of this section is the prevention and not the punishment of offences—9 C W N 898 11 C W N 223 It is intended, not to punish persons for anything that they have done in the *past*, but to prevent them from doing in the *future* something that may probably occasion a breach of the peace—9 C W N 898, 31 Cal 350 Therefore where offences *have been* committed, the proper procedure is to institute regular trials and not to take proceedings under this section—9 C W N 898

Proceedings under this section are only intended for the security of the public peace and not for the purpose of enabling one of two contending parties to help themselves in obtaining or retaining possession of immovable property and having their adversaries' hands tied down by an order under this section. The proper procedure in such cases is to take proceedings under sec 145—25 Cal 798

"Is informed"—Prior to the initiation of proceedings under this section, information must be given to the Magistrate against a person from whom it is sought to take security. When no information such as is required under this section was given to the Magistrate, it was illegal for him to issue notice to the petitioner merely because the Magistrate considered from the statement of such person that he was a quarrelsome fellow—21 Cr L J 511 (Lth). There should be *reliable* information as to the probability of the breach of the peace—1903 P L R 115 The information must be of a *clear* and definite kind, directly affecting the person against whom process is issued and should disclose tangible facts and details, so that it may afford notice to such person of what he is to come forward to meet—6 All 26, 8 C W N 180, and it should appear on the face of a Magistrate's order that he had received such credible information—6 W R 93

The words "in his opinion there is sufficient ground for proceeding" have been added by the Amendment Act of 1923, and the object

the breach of the peace or disturbance is apprehended, is within the local limits of such Magistrate's jurisdiction, and no proceedings shall be taken before any Magistrate, other than a Chief Presidency or District Magistrate, unless both the person informed against and the place where the breach of the peace or disturbance is apprehended, are within the local limits of the Magistrate's jurisdiction

(3) When any Magistrate not empowered to proceed under sub-section (1) has reason to believe that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity, and that such breach of the peace or disturbance cannot be prevented otherwise than by detaining such person in custody, such Magistrate may, after recording his reasons, issue a warrant for his arrest (if he is not already in custody or before the Court), and may send him before a Magistrate empowered to deal with the case, together with a copy of his reasons

(4) A Magistrate before whom a person is sent under sub-section (3) may in his discretion detain such person in custody *pending further action by himself under this chapter*

Change — The italicised words have been added by sec 16 of the Criminal Procedure Code Amendment Act (XVIII of 1923). The words "until the completion of the inquiry hereinafter prescribed" previously occurring in sub section (4) have been substituted by the words "pending further action by himself under this chapter". The reasons have been thus stated: "We also recommend an amendment of section 107 (4), as we think that the powers conferred by the sub section as it stands are unnecessarily wide. We think that it will be sufficient that the Magistrate should have power to detain the accused in custody 'pending further action by himself under this Chapter' and we have made this change."

— *Report of the Select Committee of 1916*

The words "in his opinion" did not occur in either of the Bills of 1914 and 1915 and have been added during the debate in the Legislative Assembly. For reasons, see below

Sections 105 and 107 —Under section 106 the order can be passed only where there has been a conviction for the offences specified therein, whereas under section 107 formal proceeding has to be taken, as in summary cases, for proving that it is necessary for keeping the peace that the person summoned should execute a bond. Under section 106, the Magistrate has adjudicated in the presence of the person to be bound over, and facts are established to require security, because the accused has already been convicted, whereas under sec 107 the Magistrate has to proceed on the information the value of which must be tested in the presence of the person concerned who should also have an opportunity to show that it is not reliable—3 C L R 72

Object of section —The object of this section is the prevention and not the punishment of offences—9 C W N 898, 51 C W N 223. It is intended, not to punish persons for anything that they have done in the *past*, but to prevent them from doing in the *future* something that may probably occasion a breach of the peace—9 C W N 898, 31 Cal 350. Therefore where offences *have been* committed, the proper procedure is to institute regular trials and not to take proceedings under this section—9 C W N 898.

Proceedings under this section are only intended for the security of the public peace and not for the purpose of enabling one of two contending parties to help themselves in obtaining or retaining possession of immovable property and having their adversaries' hands tied down by an order under this section. The proper procedure in such cases is to take proceedings under sec 145—25 Cal 798.

"Is informed"—Prior to the initiation of proceedings under this section, information must be given to the Magistrate against a person from whom it is sought to take security. When no information such as is required under this section was given to the Magistrate, it was illegal for him to issue notice to the petitioner merely because the Magistrate considered from the statement of such person that he was a quarrelsome fellow—21 Cr L J 511 (Lth). There should be *reliable* information as to the probability of the breach of the peace—1903 P L R 115. The information must be of a *clear* and definite kind, directly affecting the person against whom process is issued and should disclose tangible facts and details so that it may afford notice to such person of what he is to come forward to meet—6 All 26, 8 C W N 180, and it should appear on the face of a Magistrate's order that he had received such credible information—6 W R 93.

The words "in his opinion there is sufficient ground for proceeding" have been added by the Amendment Act of 1923, and the object

of this amendment is to prevent the Magistrate from proceeding upon any and every information. The words "is informed" in this section are too wide and the amendment therefore makes it incumbent on Magistrates to be satisfied about the correctness and veracity of that information before they take any action. See the Debates of the Legislative Assembly, January 18, 1923.

When a Magistrate receives verbal communication from certain persons it is proper that he should order the institution of some inquiry into the truth of the matter before he proceeds to take action thereupon. It is not open to a Magistrate to draw up proceedings under this section upon vague and general statements which do not amount to any direct accusation or allegation—2 P L T 669, 3 Lrh L J 480.

Further it is the duty of the Magistrate to set out the substance of the information in the proceedings—41 Mad 246. He is bound to disclose the sources of the information and the nature of the breach which he anticipates is likely to occur, before he draws up proceedings under this section—2 P L T 669.

Credible information what is not—A Magistrate ought not to act under this section upon the following informations—A statement by a private person not upon oath or solemn affirmation—6 B H C R 1 S W. R 85 a police report furnishing certain information against the accused—4 A W N 51, 10 W R 55 12 W R 60 15 W R 47 hearsay evidence—21 Cr L J 560 (Nrk) conversation out of Court with persons however respectable—6 All 132 personal knowledge of certain facts which he obtains from sources outside the record—14 A L J 769.

A statement of the complainant, in the absence of the persons charged, may be accepted by the Magistrate as credible information and may enable him to act upon it by issuing summons to show cause but it is not competent for the Magistrate, on the appearance of the persons so charged to act upon his previous information and to pass final order without taking further evidence—2 N W P H C R 461. Similar remarks apply to a report of a Sub Magistrate—2 Weir 31 1 M H C R 240 6 B H C R 1.

But the Magistrate is not entitled to institute proceedings upon facts and information which had already been the subject of enquiry under Sec 107, or in connection with charges under the Penal Code brought against the same persons, and which had ended in favour of the accused. The same facts cannot form the subject of repeated proceedings either under the Penal Code or under the Criminal Code—41 Mad 246.

Likely—This section applies when the offence is likely to be committed, and not when an offence has been committed. In other words the object of this section is to prevent offences being committed.

in the future, and not to punish past offences. Where an offence has already been committed, the proper procedure is to institute regular trials and not to institute proceedings under this section, because an order for security would very seriously prejudice them in their trial should such trial be instituted—9 C W N 898

Likelihood of breach of the peace :—The information must contain evidence of some specific conduct on the part of the accused from which a reasonable and immediate inference can be drawn that the accused is likely to commit a breach of the peace, and it is only on information of this character that the Magistrate should initiate proceedings under this section—1888 P R 21, 7 N W P H C R 233. The mere finding that the accused is a bad character and that it is not proper to leave him without a guarantee is wholly insufficient to justify an order under this section—*Ibid*. Where the evidence on the record disclosed reliable statements that persons who were ordered to furnish security to keep the peace were men who had shown by their acts and general behaviour that the object of their lives for the time was to disturb the public tranquillity by wounding the religious feelings of the Muhammadans of a certain locality, it was held that the Magistrate was justified in making such order—14 A L J 430

Where one sect of persons try to force their views on another sect of a religious congregation, with the result that a disturbance of the public peace is probable, an order binding down the former under this section to keep the peace is a perfectly valid one. Such an order should merely deter them from creating a breach of the peace and continuing to annoy the others at their worship, but should not prevent them from exercising their own right of worship—21 Cr L J 225 (Pat)

The information must shew that there is a strong and reasonable probability of a breach of the peace, and not merely a *bare possibility*—20 W R 57, 1903 P L R 115. 6 Bom L R 862. The act likely to cause a breach of the peace must be an impending one, it must be shewn to be in contemplation at the time of the information given and it will not be presumed from the fact that a person has done a wrongful act in the past that he is likely to do the same again—6 Bom L R 663, 79 All 190, 2 N W P H C R 233. U B R (1897—1901) Cr P C 15

Wrongful acts likely to occasion breach of the peace :—There are two distinct sets of circumstances in which a Magistrate may take action under Sec 107 of the Code of Criminal Procedure. first, where it appears that a person is likely himself to commit a breach of the peace or to disturb the public tranquillity, that is to say, by a direct act, e.g., by committing an assault and secondly, where a person may be the indirect cause of a breach of the peace or the disturbance of the public tranquillity

by doing a certain act, but in the latter case the Magistrate may only take action where the act anticipated is a *wrongful* act. This section does not authorise action against a person who is expected to do an act which may cause a breach of the peace or disturb the public tranquillity unless that act is *wrongful*, and the mere fact that the doing of a lawful act by certain persons may lead to the commission of a breach of the peace by other persons does not authorise action against the persons intending to do the lawful act, unless they are themselves likely to commit a breach of the peace or to disturb the public tranquillity—U B R (1916), 4th Qr, 157

It must be shown that the party is likely to do illegal acts of violence—6 Bom L R 862. Thus, threats of violence are sufficient to indicate intention to commit a breach of the peace—31 Cal 350, 27 All 92. Illegal collection of tolls accompanied with acts of violence and threats of violence in case of nonpayment of tolls is a wrongful act likely to cause a breach of the peace—21 Cr. L J 651 (Cal). An abetment by instigation of the offence of voluntarily causing hurt in a public place is a wrongful act justifying an order under this section—23 Cr L J 394 (Nag).

The words 'wrongful act' mean an act forbidden or declared to be penal or wrongful by the criminal law. The killing of a dedicated bull for the sake of the meat is not a wrongful act—21 Cr L J 453 (Pat).

The following are not 'wrongful acts' within the meaning of this section—Singing of ballads in open streets although leading to an obstruction in the street by crowds collecting to hear the same—1889 P R 13, omission to prevent a quarrel—19 W R 32, grant of leases to tenants by owner not in possession—25 Cal 798, hasty speech—1907 P W R 31, insisting to take processions along a particular road, to which others objected—12 C W N 703, use of the word *Amin* in a loud voice in prayers in a mosque—1902 P R 15, 7 All 461, 12 All 494, 13 All 419, 1887 P R 37, 22 Cr L J 590 (Oudh) stopping the services of village barber and wisherman being rendered to the complainant—7 C W N 32, the opening of a cattle market by persons on their own land not far from an already existing cattle market—16 A L J 279.

The act likely to cause a breach of the peace must be some definite wrongful act, therefore the fact that the accused had attempted to get up false cases and that he would probably continue to do so is not a ground of action under this section—1887 P R 67. So also, merely being on bad terms with others (7 C P L R 9) or being a quarrelsome, headstrong and contumacious person (1828 P R 21) is neither a definite wrongful act, nor likely to cause a breach of the peace. So also the mere fact that enmity exists between two parties does not entitle the Magistrate to bind down either party—1911 P. W R 43, 1 A L J 418.

Acts which amount to an exercise of lawful rights are not to be treated as wrongful acts necessitating an order under this section—34 Cal 935, 19 W R 47, 21 Cr L J 651 (C1). The preventive jurisdiction of a Magistrate under this section must be exercised with caution. Where its exercise may undoubtedly lead to the infringement of an undoubted civil right and where the breach of the peace apprehended by the Magistrate is a likely result of the enforcement of his legal right by a party in a legal way, the Magistrate ought not to bind down the party who has the legal right in him—34 Cal 935, U B R, (1916) 2nd Qr. 157.

Thus, the right of protection of lawful possession is a lawful right which might properly be exercised not only to resist any unlawful violence to interfere with the possession but also to defend oneself if it becomes necessary in the process. Where therefore the lawful possession of the accused had more than once been threatened by a show of armed force, and he had collected a body of men armed with *lathis* and posted them on the property to resist any violence or interference with his possession, it was held that as the intention was to maintain an existing right, the accused was justified in adopting measures for the defence of his possession, and that as there was no likelihood of a breach of the peace from his side, there was no reason either for punishing him or binding him over in security—18 A L J 157. Where one of several co sharer landlords sought to make a measurement of lands contrary to the provisions of Secs 90 and 188 of the Bengal Tenancy Act, the other co sharer landlords would be justified in objecting to the survey, and where no force was used by them, they ought not to be bound down to keep the peace—9 C W N 618. Where a Zemindari village was in possession of the Mokhassadar and the tenants had been paying rents to him, and the Zemindar came to the village with the express purpose of ousting him and incited the tenants not to pay rents to the Mokhassadar, whereupon the Mokhassadar protested and asked the Zemindar in a threatening manner to leave the village, it was held that in as much as the Zemindar was acting illegally, the Mokhassadar protesting against such illegal act was acting within his rights and could not be bound down under this section—14 M L J 491. Where a Magistrate found that persons who attempted to do *basti puja* on a waste land were not entitled to perform it, it was held that if the persons opposing it acted properly and within their rights, there was no reason to suppose that any breach of the peace was likely to be committed—3 C W N 463. Where there was already a cattle market and certain persons intended to open another cattle market on their own land, not far from the old market, and the Magistrate apprehending that there

would be a breach of the peace consequent thereon bound over those persons to keep the peace, the order of the Magistrate was illegal—16 A L J 279

But where there are doubts as to the existence of the respective rights and obligations of the parties, (*ie* as to who is acting legally in the exercise of his rights, and who is not) the proper procedure is to bind down both parties, so that the order of the Magistrate may not be detrimental to either—34 Cal 935, 20 Cr L J 194 (Pat)

Disputes relating to immoveable property—Where the apprehension of a breach of the peace arises out of a dispute regarding possession of immoveable property, the Magistrate can undoubtedly proceed under Sec 145, but this fact will not preclude the Magistrate from taking proceedings under this section. In such cases the Magistrate is not bound to act only under Secs 144 and 145, but has a discretion to proceed either under those sections or section 107—32 Cal 966, 36 Mad 315, 26 Mad 471 2 Weir 50 1 S L R 50, 23 Cr L J 567 (Nag), 24 All 419, 7 C W N 746, 24 C W N 1075, 23 Cr L J 123 (Cal), 39 Cal 150

But it is inconvenient that proceedings under Sec 107, and also under section 144 or 145 should be going on at the same time. Therefore where on the application of the petitioners for the assistance of the Magistrate in the matter of possession of a piece of land, an injunction was issued under Section 144 and proceedings were taken against the petitioner under Sec 107, *held* that the procedure was bad as in effect it debarred the petitioners from giving evidence of possession that if on the expiry of the injunction under Sec 144 there was any apprehension of a breach of the peace, the more appropriate procedure would be to take proceedings under Sec 145 rather than under Sec 107 of the Code—19 Cr L J 367 (Cal)

Where parties are clearly in the wrong, they can be bound down under section 107 to prevent a breach of the peace or a party threatening to usurp the rights of another can be restrained by a temporary order under section 144 but where the dispute relates to lands and there is an apprehension of a breach of the peace as both the contending parties urge their claim to possession, the proceedings should be under section 145 of the Code—1 P L T. 44

Sections 107, 144 and 145 all give summary jurisdiction to Magistrates to take action in order to prevent a breach of the peace when such a breach is imminent. There is a very thin line of demarcation between these sections. When there is a *long* *slow* dispute as to the right of possession between two rival parties, the proper procedure is to take action under Sec 145 and not under Sec 107, because the former

section is not only effective to prevent a breach of the peace but also is the one which causes the least prejudice to the contending parties—19 Cr L J 712 (Pat), 35 Cal 117, 25 All 537, 12 C W N 606, 1 C L J 632, 22 Cr L J 574 (Pat), 23 Cr L J, 123 (Cal), whereas the effect of an order under this section would have the effect of binding down one of the parties, leaving the other party free, without any adjudication upon the question as to which of the parties is in possession—25 Cal 559, 6 C W N 883, 12 C W N 606. See also 25 Cal 798. Proceedings under this section are intended only for the security of the public peace and not for the purpose of enabling one of the two contending parties to help himself in recovering possession of immovable property, after having his adversary's hands tied down by an order under this section. In such a case the necessary action must be taken under Section 145 of the Code—1917 P L R 144. Even if the Magistrate proceeds at all under this section, the proper order is to bind down both the parties—12 C W N 606, as for instance where both parties are equally dangerous—22 Cr L J 701.

But if the dispute is not *bona fide*, i.e. if one party is clearly in possession of property and another party wrongfully and without any claim to possession seeks to eject him by force from the possession of the land, and a breach of the peace is imminent, there cannot be said to be a *bona fide* dispute about possession within the meaning of Sec 145, and the Magistrate is justified in taking action under this section—28 All 406, 1 P L T 681. If one of the parties threatens to use violence to the other party if the latter should go upon the land of which the latter is in possession an order under this section binding down the former would be proper—9 C W N 551.

Where the dispute between the parties is not one concerning land and does not involve any question of actual possession but concerns the rights of the respective parties to carry on boring operations for coal over a specified area, the Magistrate has no jurisdiction to enter into the intricate questions of title and possession which arise between the parties. If in such a case there is a likelihood of a breach of the peace, proceedings which are simpler in nature and which summarily and expediently dispose of the matter should be adopted. That is, proceedings under Sec 107 would be more appropriate in such a case than proceedings under Sec 145 of the Code—32 C L J 54—22 Cr L J 99.

An order under Sec 107 is no bar to a subsequent proceeding under Chapter XII—39 Cal 469, 36 All 143, 21 C W N 160, 16 C W N 384.

Similarly an order under Sec 145 is no bar to the passing of an order under Sec 107, on the same facts, if the Magistrate is satisfied

that notwithstanding the order under Sec 145, one of the parties is likely to take the law into his own hands—36 Mad 315, 24 O. C 21

Proceeding under Sec 145, Order under Sec 107, and vice versa—But it is illegal to institute proceedings under one section and to pass an order under another. Thus, where the Magistrate instituted proceedings under Sec 145, and apprehending a disturbance of the peace, ordered a party to furnish security under Sec 107, it was held that the order was illegal and without jurisdiction—14 A L J 794. Similarly where a Magistrate proceeded under section 107 and concluded the proceedings thereunder but subsequently passed an order under section 145 held that the order of the Magistrate was *ultra vires*, as he failed to take written statements from the parties and receive evidence under the latter section—19 Cr L J 320 (Pat)

Such person.—Only the person who is himself likely to cause a breach of the peace (and no other) can be bound under this section, it is illegal and contrary to the provisions of this section to take recognisance from one person in order to prevent another from committing a breach of the peace—17 W R 47, 19 W R 54

A non resident—A *mindar* cannot be bound over to keep the peace merely because his local agents are committing acts likely to cause a breach of the peace—10 C L R 430. The mere fact that the *patwari* threatened to use violence does not justify the Magistrate in starting proceedings against the proprietor and manager on the presumption that the latter must have acquiesced in the action of the *patwari*—2 P L T 669. So also, where it was found that the petitioner was not himself likely to commit a breach of the peace, he should not be ordered under this section merely because his act of attaching the crops of his *rayits* would lead to a riot resulting from the resistance of the cultivators to the attachment—3 C L R 280

Master's liability for servant's acts.—Where the master, a *Panda* of Gaya, used to send his servant, always armed with a *lath*, to the Railway station for procuring pilgrims, and this led to a contest with a *valpanda* resulting in disturbance of the public peace it was held that this was sufficient to make the master liable under this section. The fact that the master himself did not go to the Railway station but always remained in his house is no bar to the application of this section—1 P L J 361

Evidence.—A Magistrate dealing with proceedings under this section must base his judgment upon evidence relevant to the case. He should not rely upon his knowledge of certain facts which he obtains from sources outside the record—14 A L J 769. Where the order is passed against more persons than one, there must be definite evidence in the case of any and every person that there is a danger of a breach of the

peace by him. The mere fact that a collective body of persons are indulging in feelings of hostility against another body of persons is insufficient—35 All 419. The fact of likelihood of a breach of the peace must be established by independent evidence. In the absence of evidence to prove that the accused was likely to commit a breach of the peace the accused's own statement before the Magistrate that he is willing to giving security would not justify an order being passed under this section—21 Cr. L. J. 176 (All), 1915 P. R. 24, 1917 P. R. 27, 20 Cr. L. J. 105, 21 Cr. L. J. 656 (Nag), 23 Cr. L. J. 175 (Lah).

Subsection (2)—Jurisdiction of Magistrates —Person residing outside jurisdiction.—The terms of this subsection do not authorise a Magistrate to bind over a person not residing within the limits of his district, concerning whom he has received information that such person is likely to commit a breach of the peace within his district—6 All 26 (F. B.), 14 All 49, 11 Cal 737, 12 Cal 133, 23 Bom 32. The proper course in such a case is to cause information to be given to the Magistrate within whose district the person resides, in order that proceedings might be taken by that Magistrate—18 Cal 717.

Temporary residence within jurisdiction.—In order to give the Magistrate jurisdiction over a person, it is not necessary that such person should permanently or habitually live within his jurisdiction. It is sufficient if at the time when the Magistrate receives information and takes proceedings under this section, the person temporarily resides within his jurisdiction—24 Cal 314, 22 Cr. L. J. 109 (All).

Special powers of Chief Presidency and District Magistrates.—Subsection (2) gives special powers to Chief Presidency and District Magistrates to proceed against persons outside jurisdiction. Therefore where a District Magistrate is satisfied that a breach of the peace is apprehended within the local limits of his district, the fact that the accused is living outside such limits in a Native State does not take away his jurisdiction to pass an order under this section—20 A. L. J. 523. But the District Magistrate cannot delegate this special power to a subordinate Magistrate. Thus a Subdivisional Magistrate cannot on the direction of a District Magistrate draw up proceedings under this section against a person residing in another jurisdiction, in such a case the proceedings must take place and be brought to a conclusion before the District Magistrate himself—13 C. W. N. 580. A District Magistrate is not competent to make over the initiation of proceedings under this section to a Magistrate who has no local jurisdiction over the matter—41 Mad 246. But after proceedings have been initiated by a District Magistrate against persons residing outside jurisdiction he can transfer the proceedings to a subordinate Magistrate. This section only restricts

the initiation of the proceedings against persons living outside the jurisdiction of the District Magistrate, but does not prevent him from transferring such proceedings, after initiation, to a subordinate Magistrate though such Magistrate had no jurisdiction to initiate the proceedings—31 Cal 350, 24 All 151, 27 C L J 314. But the District Magistrate cannot make over the case to a 2nd class Magistrate—37 All 20.

Subsection (3)—‘Has reason to believe’—The use of this expression (as compared with ‘is informed’ in subsection (1) shows that the Magistrate’s discretion under this subsection is very limited. The Magistrate should act when he has *reason to believe*, i.e., when he has reasonable grounds to *believe* and not merely to *suspect*. See 6 Bom 402.

Subsection (4)—Power to detain in custody—Only in the special circumstances referred to in clauses (3) and (4) does the law empower the Magistrate to detain a person against whom proceedings have been instituted under this section—32 Cal 80. Therefore, where an accused was not sent before a District Magistrate by another Magistrate acting under clause (3) so as to bring the case under clause (4), such District Magistrate’s order detaining the accused in custody was illegal—31 Mad 315.

Bail—Even when the person has been arrested under clause (3), unless there are special circumstances, he should be admitted to bail. When a Magistrate on the report of the D S P directed the re-arrest of persons whom he had previously admitted to bail, on their appearance and remanded them to custody, it was held that the re-arrest and remand were illegal, as none of the special circumstances mentioned in clause (3) existed in the case, and the Magistrate was bound under Sec 496 to release them on bail—32 Cal 80. But where the special circumstances mentioned in clause (3) exist, the Magistrate may in his discretion detain such persons in custody, according to the clear words of subsection (4), and section 496 does not give an absolute right to bail—36 Mad 474.

[Proposed Amendments]—In the Indian Legislative Assembly, Mr Agnihotri proposed that after sub section 3 of this section another sub section should be added, laying down that “proceedings under Section 107 shall not be taken against a person for delivering political speeches or doing political propaganda which he is lawfully entitled to do”. Bhai Mansing, in supporting this amendment, related to the House the incidents in the Punjab, where this section was misapplied through political bias in connection with the Akali movement. This motion was put to vote and lost.

Mr Rangachariar then proposed a very important amendment. He moved that after subsection (1) the following subsection should be added

"In all cases where action is taken under this section to prevent a person or persons from holding or addressing meetings, a report forthwith shall be made to the Sessions Judge who may call for and examine the record of any proceeding for the purpose of satisfying himself as to the correctness, legality or propriety of the same and pass such order as he thinks fit." In support of this motion Mr Rangachariar said that he had not supported Mr Agnihotri's amendment, because he felt that in certain political cases a man by a violent speech might be likely to cause a breach of the peace and in that case section 107 might be necessary. But the experience of the last two years had taught him that some ingenious legal expert in the Government of India has invented the use of sections 107 and 144 to stifle political agitation. Mr Rangachariar told the Government that with one hand they had repealed repressive laws and in the other hand trotted out these two sections to mow down many peaceful non co operators, who, rightly or wrongly, did not want to apply to High Courts against it. If the purpose of law was to do justice, continued Mr Rangachariar, then the misuse of this section on the part of biased or weak magistracy must be checked by the automatic corrective which his amendment provided, and he further exhorted the Government that after all it was in their interests to accept his amendment, for if his amendment was accepted, those people whose confidence in the Government and its magistracy was declining would pause and see that Government by itself have provided a safeguard against the misuse of criminal law against those who are considered to be extremists.

The Home Member replied that by giving these revisionary powers to Sessions Judges, Government would be throwing a great burden on Judges.

The motion was put to vote and lost. See the *Debates of the Legislative Assembly*, January 18, 1923.]

Nature of proceedings under this chapter —There is no unanimity of opinion among the various Courts as to whether proceedings under this section (or under this Chapter) are of a criminal nature, or as to whether the persons proceeded against under this Chapter are accused persons. In 41 Cal 719, 27 Mad 510 39 Mad 539, 28 Cal 709 3 O C 247, 41 All 503 it is held that proceedings under this chapter are of a criminal nature, therefore, a person who brings a proceeding under sec 107 from malicious motive, is liable to an action for malicious *prosecution* if the proceeding terminates in favour of the person against whom the allegation is made—41 All 503, 43 All 402, whereas in 1914 P R 5 and 1916 P L R 78 it has been held that proceedings under sec 110 are not criminal proceedings, and the Chief Court has no power to direct

the transfer of such proceedings under Sec 526 from one Magistrate's Court to another

In the following cases it has been held that persons proceeded against under this chapter are in the position of 'accused' persons—36 Cal 193, 21 All 107, 1905 P R 33, 1900 P. R 15, 27 Cal, 656, 21 All 107, 23 Cal 493, 16 Bom 661, 4 C L R 454, 43 Mad 510, and therefore the accused is entitled to a trial *de novo* under sec 350 on the Magistrate being transferred—43 Mad 510, and further enquiry can be ordered in case of such persons under Sec 437 (now Sec 436)—21 All 107, 24 All 148, 1905 P R 33, 27 Cal 656 16 Bom 661, 23 Cal 493

But in 36 All 262, 5 Bom L R 27, 32 Cal 80, it has been held that such persons are not accused persons within the meaning of Sec 167; nor within the meaning of Sec 437 (now 436) of the Code—1905 P R 42, 27 Cal 662. An application to take proceedings under Sec 107 is not an accusation of an offence—1905 P R 42, 1896 P R 4, and therefore compensation cannot be awarded to the person under Sec 250 against whom proceedings under this chapter have been dropped, such proceedings not being proceedings in a case in which a person is accused of an offence—25 Bom 48, 1893 P R 16, 1903 P L R 9, 15 All 365, 20 A L J 624 1896 P R 4, 1884 P R 37. An order binding a person under Section 107 is not an order 'convicting' a person under any law—2 P L T 175

108 Whenever a Chief Presidency or District Magistrate, or a Presidency Magistrate or Magistrate of the first class specially empowered by the Local Government

Security for good
behaviour from persons
disseminating seditious
matter

in this behalf, has information that there is within the limits of his jurisdiction any person who within or without such limits, either orally or in writing or in any other manner intentionally disseminates or attempts to disseminate, or in any wise abets the dissemination of,—

- (a) any seditious matter, that is to say, any matter the publication of which is punishable under section 124 A of the Indian Penal Code or
- (b) any matter the publication of which is punishable under section 153 A of the Indian Penal Code or
- (c) any matter concerning a Judge which amounts to criminal intimidation or defamation under the Indian Penal Code,

such Magistrate, *if in his opinion there is sufficient ground for proceeding*, may (in manner hereinafter provided) require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix.

No proceedings shall be taken under this section against the editor, proprietor, printer or publisher of any publication registered under, *and edited, printed and published* in conformity with, the rules laid down in the Press and Registration of Books Act, 1867 [XXV of 1867] *with reference to any matter contained in such publication* except by the order or under the authority of the Governor-General in Council or the Local Government or some officer empowered by the Governor-General in Council in this behalf.

Change —The italicised words have been added by Sec 17 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

'Or in any other manner' —“This amendment is to provide for the contingency where the matters covered by section 108 have been disseminated by other means than either orally or in writing *e g* by gramophone records”—*Statement of Objects and Reasons* (1914).

'Ifproceeding' —For the reason of the addition of these words, see notes to sec. 107, under heading “Is informed”

'And edited' —“In view of the recent amendments made in the Press and Registration of Books Act, 1867, regulating the editing of newspapers, we have made a consequential amendment here. We also think that the protection given by the last clause of section 108 should only extend to newspapers which are edited, printed and published in conformity with that Act”—*Report of the Joint Committee* (1922).

'With reference publication' —“This amendment is merely designed to make the intention of the Legislature clearer as regards the proceedings which require sanction prior to their institution”—*Statement of Objects and Reasons* (1914)

Seditious matter —The test under this section is whether the person proceeded against has been disseminating seditious matter, and whether there is a fear of the repetition of such offence. In every case it is a question of fact which will have to be determined with reference to the antecedents of the person, and other surrounding circumstances—11 Bom. L. R 743. The preaching of *swaraaj*, which means nothing more

than Home-Rule under the present Government by constitutional means, does not amount to dissemination of seditious matter, and does not therefore justify an order under this section—34 Cal 991, 19 Bom L R 211 (*Tilak's case*) It is essential under clause (a) of this section that the matter disseminated must be *seditious*—19 Bom. L. R 211. The mere fact that the names of certain persons appear on a seditious pamphlet as its author, printer and publisher does not justify an order under this section against those persons, where there is no direct evidence to connect any of those persons with the pamphlet in question or the dissemination thereof—25 Bom. L R 97.

Section 153A, I P. C.—*Promoting enmity between classes*—*Intention*—To sustain an order under this section, it is not sufficient that the language used was highly offensive to one community, but it must be shown that the accused intended to provoke feelings of hatred or enmity between two communities. But it is not necessary that he should have succeeded in provoking such feelings, it is sufficient if he intended to do so—4 Bur L T. 84

In 43 Cal 591, on the other hand, it has been held that to justify an order under Sec. 108, one has only got to find that the words used in the leaflet or the matter complained of are likely to promote feelings of hatred or enmity and there is no necessity under this section of finding intention, such as would be necessary if the person were placed on his trial under Sec. 153A, I P. C

109. Whenever a Presidency Magistrate, District Magistrate, Sub divisional Magistrate or Magistrate of the first class receives

Security for good
behaviour from
vagrants and suspected
persons.

information—

(a) that any person is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, and that there is reason to believe that such person is taking such precautions with a view to committing any offence, or

(b) that there is within such limits a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good

behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix.

Scope and object —This section provides for taking security, not from persons suspected of a *particular offence*, but from persons lurking within the Magistrate's jurisdiction, who have no ostensible means of subsistence, or cannot give a satisfactory account of themselves—Ratanlal 63.

This section aims at summarily disposing of vagabondism, where sturdy rogues are found to be lurking about—s O S C No 73.

Application of section —Magistrates are empowered to put in force the provisions of this section whenever they have credible information that the accused has no ostensible means of livelihood or is unable to give a satisfactory account of himself, and is within the local limits of his jurisdiction—31 Cal 557 6 A L J 253 Whether the person is before them under a lawful arrest or not is immaterial—31 Cal 557, see also 26 Mad 124

Within the Magistrate's jurisdiction —It is not necessary that the accused person should have a residence within the local limits of the Magistrate's jurisdiction—2 Weir 53 The fact that the accused was arrested from a place outside the Magistrate's jurisdiction and that the arrest was illegal will not oust the Magistrate's jurisdiction to proceed under this section—26 Mad 124 followed in 31 Cal 557

When a person gives a satisfactory account of his presence within the limits of the Magistrate's jurisdiction, he cannot be called upon by such Magistrate to give an account of his presence in any other jurisdiction—39 Cal 456

Concealing presence with a view to commit offence —Where a person's presence or residence within the Magistrate's jurisdiction was well known and there was no attempt to conceal the same, his mere attempt to conceal his presence at a particular spot at a particular time or his inability to give a satisfactory explanation of what he was doing at a particular place at a particular time does not bring his case within Sec 109, and he cannot be ordered to give security for good behaviour This section refers to a *continuous* act and does not apply to a case where there is a momentary effort at concealment to avoid detection or arrest—22 C W N 163

The concealment referred to must be with a view to committing some offence Therefore a person cannot be called upon to furnish security under this section in respect of an alleged temporary concealment in his father's house merely to avoid observation of police (owing to a warrant being issued against him) unconnected with any intent to

than Home Rule under the present Government by constitutional means, does not amount to dissemination of seditious matter, and does not therefore justify an order under this section—34 Cal 991, 19 Bom L R 211 (*Tilak's case*) It is essential under clause (a) of this section that the matter disseminated must be *seditious*—19 Bom L R 211 The mere fact that the names of certain persons appear on a seditious pamphlet as its author, printer and publisher does not justify an order under this section against those persons, where there is no direct evidence to connect any of those persons with the pamphlet in question or the dissemination thereof—25 Bom L R 97

Section 153A I P C —Promoting enmity between classes —
Intention—To sustain an order under this section, it is not sufficient that the language used was highly offensive to one community, but it must be shown that the accused intended to provoke feelings of hatred or enmity between two communities But it is not necessary that he should have succeeded in provoking such feelings, it is sufficient if he intended to do so—4 Bur L T 84

In 43 Cal 591, on the other hand, it has been held that to justify an order under Sec 108 one has only got to find that the words used in the leaflet or the matter complained of are likely to promote feelings of hatred or enmity and here is no necessity under this section of finding intention, such as would be necessary if the person were placed on his trial under Sec 153A, I P C

109 Whenever a Presidency Magistrate, District Magistrate, Sub divisional Magistrate or Magistrate of the first class receives information—

Security for good
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(a) that any person is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, and that there is reason to believe that such person is taking such precautions with a view to committing any offence, or

(b) that there is within such limits a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good

behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix

Scope and object —This section provides for taking security, not from persons suspected of a *particular offence*, but from persons lurking within the Magistrate's jurisdiction, who have no ostensible means of subsistence, or cannot give a satisfactory account of themselves—Ratanlal 63

This section aims at summarily disposing of vagrondism, where sturdy rogues are found to be lurking about—r O S C No 73

Application of section —Magistrates are empowered to put in force the provisions of this section whenever they have credible information that the accused has no ostensible means of livelihood or is unable to give a satisfactory account of himself, and is within the local limits of his jurisdiction—31 Cal 557 6 A L J 253 Whether the person is before them under a lawful arrest or not is immaterial—31 Cal 557, see also 26 Mad 124

Within the Magistrate's jurisdiction —It is not necessary that the accused person should have a residence within the local limits of the Magistrate's jurisdiction—2 We r 53 The fact that the accused was arrested from a place outside the Magistrate's jurisdiction and that the arrest was illegal will not oust the Magistrate's jurisdiction to proceed under this section—26 Mad 124 followed in 31 Cal 557

When a person gives a satisfactory account of his presence within the limits of the Magistrate's jurisdiction, he cannot be called upon by such Magistrate to give an account of his presence in any other jurisdiction—39 Cal 456

Concealing presence with a view to commit offence —Where a person's presence or residence within the Magistrate's jurisdiction was well known and there was no attempt to conceal the same, his mere attempt to conceal his presence at a particular spot at a particular time or his inability to give a satisfactory explanation of what he was doing at a particular place at a particular time does not bring his case within Sec 109, and he cannot be ordered to give security for good behaviour This section refers to a *continuous* act and does not apply to a case where there is a momentary effort at concealment to avoid detection or arrest—22 C W N 163

The concealment referred to must be with a view to committing some offence Therefore a person cannot be called upon to furnish security under this section in respect of an alleged temporary concealment in his father's house merely to avoid observation of police (owing to a warrant being issued against him) unconnected with any intent to

commit an offence, or with any previous concealment outside the Magistrate's jurisdiction—39 Cal 456

A person who gives a false name and delivers letters secretly containing incitement to commit crimes or demanding money for the means of committing crimes comes within the provisions of clause (a)—15 Cr L J 255 (Cal)

Want of ostensible means of subsistence —Mere proof of want of ostensible means of subsistence is not of itself a sufficient reason for passing an order for furnishing security. A Magistrate is bound to consider whether the order is really necessary in order to secure good behaviour, which is a matter for the Magistrate's judicial discretion, and he ought not to send people to jail simply because the opinions of Police witnesses are unfavourable to them—Ratanlal 723

A young man, out of employment, staying in the house of his father, who is a man of substance and able if necessary to support him, cannot be held to be without ostensible means of subsistence within the meaning of this section—39 Cal 456, 22 Cr L J 749 (Lah). So also the mere fact that a man is doing no work at present and was previously convicted for bad livelihood (5 C W N 23), or the mere fact that he belongs to a wandering tribe (2 Weir 53) or to a gang which frequented *melas* and carried on illegal games (6 A L J 253) or the mere fact that he is a gambler or opium smoker (1 Bur S R 246) or has no other means of subsistence except through play of ring game (40 Cal 702) is not a sufficient ground for requiring him to give security.

'Cannot give a satisfactory account of himself —Clause (b) of this section applies not only to vagrants or vagabonds, but also covers suspected persons of any class who cannot give a satisfactory account of themselves—13 Cr L J 239 (Cal). A person who gives a false name or address (22 Cr L J 749) or gives a false account or cannot give a satisfactory account of his associations with persons who are dangerous political conspirators (13 Cr L J 239) is included in this section.

The words 'cannot give a satisfactory account of himself' do not mean failure to satisfy the Magistrate that he spends his time or at least his leisure hours in a satisfactory manner, and therefore the fact that a person, whose residence and occupation were well known, was said to prowl about at night and was a companion of scoundrels and was armed with a lathi is not a sufficient ground for calling upon him to furnish security—8 A L J 1097

Where it was proved that the accused were residents of another district where they had their houses, that they had money with them, that they were dealers in cattle and that they had money in deposit

with bankers, it could not be said that they had not been able to give a satisfactory account of themselves. And the mere fact that they were camping in an open ground in a city while on their way home, would not justify the Magistrate in passing an order under this section—18 A L J 321

'With sureties' —Compare this expression with the words "with or without sureties" in the preceding section. The requirement of surety in this section is obligatory and not optional.

Nature of evidence under this section —Mere proof of ostensible means of livelihood is not a sufficient reason for passing an order under this section—Ratanlal 723, the Magistrate should take evidence as to the general character of the person charged with bad livelihood, and not convict him on the mere report of Police officers—5 W R 2

The fact that the accused had previously been connected with a criminal conspiracy or might still be in correspondence with criminals, is not relevant under this section, though it might form the basis of a substantive proceeding under Sec 110—39 Cal 456

Order passed on mere suspicion —An order under this section passed more on suspicion than on any good basis of fact must be set aside. Where three respectable residents of Delhi came to Meerut by a night train, and were found on the road between the station and the city near to a place where a burglar's jemmy was found, an order calling upon them to furnish security for good behaviour was illegal—17 A L J 432. See also 17 A L J 891

110 Whenever a Presidency Magistrate, District Magistrate, Sub divisional Magistrate or a Security for good behaviour from habitual offenders Magistrate of the first class specially empowered in this behalf by the Local Government receives information that any person within the local limits of his jurisdiction—

- (a) is by habit a robber, house breaker, thief or forger, or
- (b) is by habit a receiver of stolen property knowing the same to have been stolen, or
- (c) habitually protects or harbours thieves or aids in the concealment or disposal of stolen property, or
- (d) habitually commits or attempts to commit, or abets the commission of, the offence of kidnapping, abduction, extortion or cheating or mischief, or any offence

punishable under Chapter XII of the Indian Penal Code or under Section 489A, Section 489B, Section 489C, or Section 489D of that Code ; or

(e) habitually commits, or attempts to commit, or abets the commission of, offences involving a breach of the peace ; or

(f) is so desperate and dangerous as to render his being at large without security hazardous to the community,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit to fix.

Change —The amendment of this section as shown by the italicised words, has been effected by sec. 18 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

"We agree that habitual kidnappers should be brought under this section, but doubt the necessity of any reference to abduction. We think that it is desirable to include all offences under Chapter XII of the Indian Penal Code, and also habitual forgers. We have included "forger" in section 110 (a), and have rearranged (d) in accordance with this note"—*Report of the Select Committee of 1916*

The ruling in 1900 P. R. 28 where it was held that a habitual forger did not come under this section is no longer good law.

Object of section —The object of this section is to afford protection to the public against a repetition of crimes in which the safety of property is menaced and not the security of person alone is jeopardised —2 All 835

Again, the object of this section is the prevention and not the punishment of offences, and with that object it authorises the Magistrate to take security for good behaviour. But it is solely for the purpose of securing future good behaviour that the section can be used. Any attempt to use it for the purpose of punishing *past offences* is wrong and not sanctioned by law—1 C. L. R. 268, 2 Cal 110, 7 All 67, 7 C. L. R. 352. Therefore where the accused have committed definite acts of extortion for which they are liable to be prosecuted, an order for furnishing security under this section should not be passed, because

such order would seriously prejudice them in their prosecution—27 Cal 781

Moreover, this section is not intended to afford the police a means of keeping a suspected person under detention until they are able to work out a case against him—10 A L J 351

Application of section —This section arms the Magistrate with very powerful means of securing the interest of the community from injury at the hands of hardened offenders of the most dangerous classes—4 N W P H C R 117, 1 A L J 616 Therefore the power given by this section should be exercised with much discretion by the Magistrate and only in those cases where the evidence is clear and precise (2 Lah L J 237 9 A W N 114 3 Mad 238, and is not to be applied *too freely*, and to persons whose cases are not within its provisions—4 N W P H C R 117, 6 Cal 14 nor should its exercise be confined to cases in which positive evidence is forthcoming of the commission of offences—3 Mad 238, 10 M L T 333

Moreover, Magistrates should be cautious in making sure that the provisions intended for securing the peace of the community are not utilized for taking private vengeance under the aegis of a Crown prosecution—38 Cal 156, nor for oppressive purposes—1892 P R 5 It is to be feared that this section is often resorted to by the Magistrates for the purpose of ensuring the punishment of the persons *suspected* but not *proved* to have committed offences such as theft, etc., and it is notorious that accusations of bad livelihood are constantly made with the object of blackening an enemys character and satisfying feelings of spite and hatred So it is incumbent on the Magistrates to see that this section is not resorted to unnecessarily and to annoy individuals—1898 P R 4 The Courts must not make use of this section in order to secure a conviction of persons against whom a substantive charge has broken down—23 O C 371—22 Cr L J 273, 24 O C 317

Secs 108 and 110 —The mere fact that Sec 108 may have been applicable does not necessarily make Sec 110 inapplicable—46 Cal 215

Secs 109 and 110 —The two sections overlap each other They must be carefully worked and great care should be taken not to abuse them The proceedings taken must clearly specify whether the accusation which the accused is to meet is one under section 109 or 110—Mad Pol Man p 89 Therefore where the order passed by the Magistrate was not clear in that the accused did not know whether the accusation he had to meet was under section 109 or 110 the order was set aside—11 Cal 13

An order under Sec 110 is not valid during the continuance of an order under Sec 109 the two sections having the same object and the evidence required to secure an order under either section being of the

same nature—8 C W N. 543 A person cannot be bound down under both the sections, 109 and 110—38 Mad 555, 38 Mad 556

Secs 107 and 110 —When the information set forth in the order of the Magistrate refers to an apprehended *breach of the peace*, sec 110 is not applicable, but proceedings should be instituted under Sec 107 A Magistrate has no authority whatever under the law, upon information that suggests the likelihood of an assault being committed and the peace endangered, to resort to sec 110, and it is altogether *ultra vires* for him to proceed thereunder—6 All 132 When a Magistrate at first issued notice with reference to sec 110, but subsequently found that the case was under sec 107, he ought not to deal with the case as one under sec 107, without issuing fresh notice with reference to the altered view of the circumstances The notice issued with reference to sec 110 can not be held sufficient to comply with the requirements of law, because the facts necessary to be proved to make the accused liable under sec 110 are different from those under sec 107, and the accused should have notice of the facts on which the Magistrate proposes to proceed against him—30 Mad 282

Similarly, where notice was issued to show cause why the accused should not be bound down to keep the peace under Sec 107, he cannot be directed in the final order to execute a bond for good behaviour under Sec 110—25 Cal 798 But where the evidence was recorded at length and parties had opportunity to cross examine and were not prejudiced, it was held that the irregularity was cured by Sec 537—14 Cr L J 65 (Mad)

Magistrates specially empowered —The section only permits the particular Magistrates mentioned in the section to deal with the cases falling under it Orders in such cases made by other Magistrates are invalid and without jurisdiction—17 Cr L J 141 (All) In the Punjab, all first class Magistrates have been empowered to act under this section—Punjab Gazette, 3 2 1882, Part I, p 32 In Madras, according to Madras Act III of 1888, Sec 7, the Commissioner of Police can act as a Magistrate under this section

The special power must be conferred by the Local Government only, it cannot be conferred by the District Magistrate—Ratanlal 838 Therefore a first class Magistrate not specially empowered under this section cannot exercise jurisdiction in a case arising under it upon a transfer thereof to him by the District Magistrate—*Ibid*, 22 Cal 898

Information —A Magistrate cannot proceed under this section unless he has the necessary information And there must be some information to work upon before a person can be arrested This section is not intended to empower the Police to arrest a person without any

information and then to work out a case against him and give information to the Magistrate—to A. L. J. 351

Nature and source of information—There is no limit to the nature and source of information on which a Magistrate may institute proceedings under this section—27 All 172 But the information cannot be proceeded upon unless it comes from a trustworthy source—*Punj. Civ. p.* 165

The Magistrate is not bound to reveal the source of the information to the person concerned, for the information is not any evidence against the accused, moreover, if a Magistrate is to set out before the accused the names of the persons from whom he receives information and the nature of the information given, very few self-respecting persons would dream of placing any information at the disposal of the Magistrate—27 All 172

The words "receives information" in this section include information howsoever obtained. The law does not limit the method in which the Magistrate who is empowered by the Local Government is to receive the information. He may receive the information through some other Magistrate. Therefore where the police made a report to the senior Deputy Magistrate that certain persons were in the habit of committing mischief, extortion, and other offences, and that Magistrate forwarded the report to another Magistrate of the first class, *And* that the latter had jurisdiction to institute a proceeding under this section on the report—1 Pat 621

As to what is or is not credible information, see notes under Sec. 107.

The information to be required by a Magistrate may be to some extent of a hearsay and general description but when the party to whom the order is directed appears in Court in obedience to such order, the inquiry must be conducted on the lines laid down in section 117 of the Code—6 All 132

Conversations out of Court with persons however respectable are not legal or proper materials upon which to adopt proceedings under this section—6 All 132 It is incumbent on Magistrates to exercise the greatest caution and impartiality, and to be careful not to be influenced by outside gossip and vague rumours—1898 P. R. 4

Personal knowledge—Magistrates are not competent to base their orders on their local and personal knowledge of the accused and witnesses—29 Cal 392, 22 W. R. 79 The proper procedure, where it is important to utilize the personal knowledge of a Magistrate, is for the case to be tried by another Magistrate, and for the former Magistrate to give evidence as a witness—29 Cal 392, 1903 P. R. 27.

Inquiry into truth of information —A Magistrate is bound to enquire into the truth of the information received, notwithstanding that the accused consents to furnish security—U B R (1902—3) 1

Duty to take information on oath —It is often desirable that the Magistrate should take information upon oath, in the presence of the accused, especially in a case which may fall under both sections 109 and 110, before deciding whether he will act under section 109 or 110. The reason is that after framing an order under one section he might find that the evidence referred mainly to the other section. The issue would thus become complicated and the accused would be prejudiced in his defence—U B R (1905) 29

“Within the Magistrate’s jurisdiction” —A Magistrate can take action under this section when the persons concerned reside within the local limits of his jurisdiction—3 C L J 195, 1918 M W N 751, and it is not contemplated by this section that he can issue a warrant, so as to pursue the person concerned into another jurisdiction—27 Cal 993, nor is it contemplated that the Police should be at liberty to bring persons from distant places outside the Magistrate’s jurisdiction to a place within the local limits of his jurisdiction and then to ask the Magistrate to exercise his jurisdiction—1885 P R 43 Contra—8 L B R 378=17 Cr L J 319. But if the person has been arrested outside the jurisdiction for an offence committed within the jurisdiction, and the charge of substantive offence fails, the person can be proceeded against under this section—46 Cal 215

But the residence need not be *permanent* residence within the local limits of the Magistrate’s jurisdiction. Therefore persons who ordinarily did not reside within the Magistrate’s jurisdiction, but resided within his jurisdiction *at the time of taking action* could be proceeded against under this section—36 Mad 96, 23 C W N 100, 30 C L J 173, 20 A L J 49, 9 Bom L R 244, 14 Bom L R 889. The reason is, that the most dangerous criminals have no well known residence anywhere and wander from place to place and it should be left in the power of the Magistrate to deal with them where the Police or the Magistrate could be sure, at any time, of finding them—9 Bom L R 244 Contra—27 Cal 993. In 43 Cal 153, the words “within the local jurisdiction” were construed to have a still wider meaning, and it was held that no residence (permanent or temporary) was necessary—it was sufficient to give the Magistrate jurisdiction if the evil habits were practised and evil reputation acquired within the local limits of his jurisdiction. See also 14 A L J 1074, where it has been laid down that having regard to the plain language of this section it is clear that a Magistrate is given power to deal with persons who have a general reputation as bad characters, and who

happen to be within his jurisdiction, as there is nothing in the section bearing upon the question of *residence*

Where the accused had a residential house within the Magistrate's jurisdiction, to which he occasionally, if not often, went for the purpose of his business, the Magistrate had jurisdiction over him, provided the accused committed the acts of oppression while he so resided—31 Cal 419

Residence always implies voluntary residence. Therefore a person undergoing imprisonment within the Magistrate's jurisdiction cannot be said to be voluntarily residing there—27 Cal 993, 23 Bom 32. So also persons arrested from outside, and brought and detained within the Magistrate's jurisdiction cannot be said to reside within the Magistrate's jurisdiction—1885 P R 43. Contra—8 L B R 378. But in 46 Cal 215, 8 L B R 353 (overruling 4 L B R 148) it has been held that an order under this section may be made against a person who is in custody in jail at the time of the proceeding.

Scope of offences —This section is not limited to offences in which the safety of property is menaced, but applies also to a case where the objects of the accused are primarily directed against the security of the person only—23 C W N 193

Clause (a)—Habitual thief —The evidence must be of such a nature as would lead to a reasonable and definite ground for coming to the conclusion that the accused was a *habitual* thief—8 C W N 543. There should be proof of specific acts showing that he to the knowledge of some particular individual is by habit a thief or a dacoit—29 Cal 779

A person's own confession that he is a bad character and that he had been once in jail, does not amount to his being by habit a thief—3 Bom L R 266

Mere association with men of bad characters is not sufficient to bring a man under this section as being by habit a thief etc, unless the association is to commit theft etc. So, the fact that a *Lendumer* had tenants of bad character and he used to lend money and paddy to them does not bring him under this section—6 C L J 711

Clause (c)—Aid in concealment of stolen property —This clause is designed to meet only the case of professional receivers of stolen property who assist the thief by protecting him from discovery and arrest and by helping him to dispose of such property—(1910) U B R Cr P C 4

Harbouring thief —The harbouring must be to screen the offender from punishment. A person giving food or shelter or medical assistance to a starving or invalid criminal, from mere motives of humanity and

not with the intention of enabling him to escape justice, does not come within the purview of this section—*Ibid*

Clause (d)—*Habitually committing extortion*—Section 110 is not applicable to the case of persons who commit acts of extortion in a certain capacity (e g the *burkundozes* of Zemindars commit acts of extortion on tenants) in the performance of their duties, as it cannot be said that they are in the habit of committing extortion as individual members of the community because, if it so happens that they cease to be in the employ of the Zemindars, they would no longer commit those acts of extortion. The proper course of dealing with the case is to prosecute them or their masters under whose orders they act for specific acts of oppression—27 Cal 281

Persons in the habit of bringing false claims by forged entries (1884 P R 25) or obtaining decrees by means of forged documents (1914 P R 21) cannot be said to be habitually committing extortion

A person who brings a claim in the Civil Court which he knows to be false commits an offence under S-c 209 I P C but he does not by so doing commit an offence of extortion, if he succeeds in the claim, or an offence of attempting to commit extortion, if he fails in his claim and he cannot be bound down under this section—20 O C 129, 19 Cr L J 885 (Nag)

Committing mischief—This clause applies to persons who habitually commit mischief, where the evidence shows the man to be of an excellent character, one unsupported charge of mischief by fire does not bring him within the purview of this clause—24 W R 37

Clause (e)—*Offences involving breach of the peace*—See notes under sec 106

Clause (f)—*Desperate and dangerous character*—A man of desperate and dangerous character in clause (f) means a man who has a reckless disregard of the safety of the person and of the property of his neighbours—46 Cal 215, 11 C W N 789. Evidence of acts of extortion committed by a person, unless those acts were accompanied by acts causing danger to life and property, is not sufficient to bring the case under this clause—11 C W N 789

But where it was found that the accused persons were associated for the purpose of spreading disloyal doctrines among school boys and besides being engaged in preparing the young for the future revolution, were connected with an organisation for the collection of money by dacoity, it was held that the facts were sufficient to bring the case within clause (f) of this section—46 Cal 215, 23 C W N 193

The following persons do not come under this clause —

A person who had been arrested on suspicion of the commission of a dacoity and released (11 C. W. N. 129; 17 Cr. L. J. 184 (Oudh); 1 Bur. S. R. 422); a person who is known to be a bad character and is earning his living by prostituting one of his wives (1892 P. R. 5); a person who had been annoying the neighbours in various ways by knocking at their doors at night or throwing brickbats over their roofs, or who had been annoying respectable women (5 C. W. N. 249); a person who is a nuisance to his neighbours, declines to pay debts, abuses his neighbours, and makes indecent overtures to school boys who pass by his shop (16 Cr. L. J. 582 All), a person of a violent or turbulent character (5 W. R. 6), a person who promotes litigation and is said to have had considerable influence with *fast men* (16 A. L. J. 776).

It is not sufficient to ground a finding under this clause on vague and general evidence that some one was beaten and robbed and people say that the accused was responsible—9 O. C. 69. Such a finding must be based on definite evidence of facts, and evidence of general repute is not sufficient—29 Cal. 779, 3 C. W. N. 249, 11 C. W. N. 789; 9 O. C. 69; 1917 P. W. P. 8. But under sub section (4) of section 117 as now amended in 1923, evidence of general repute will be admissible to show that a man is a desperate and dangerous character.

Evidence, which was rejected as unreliable and insufficient to convict a person of the charge of dacoity, should not be treated as reliable evidence to show that such person was a dangerous and desperate character who ought to be called upon to furnish security for good behaviour—17 Cr. L. J. 184 (Oudh).

Evidence under this section.—The evidence that is required to justify an order under this section is not necessarily evidence that the accused has committed *definite* criminal offences, but evidence sufficient to prove in a judicial enquiry that he comes within the category of one of the clauses (a) to (f)—1899 P. R. 10. It is not because a man has a bad character that he is therefore necessarily liable to be called upon to furnish security for good behaviour. There must be satisfactory evidence that he is one of the persons mentioned in the section—6 All. 132, 4 N. W. P. H. C. R. 117, 6 Cal. 14, 14 All. 45, 6 W. R. 6, 1881 P. R. 12. The evidence that a certain person is of bad character is not sufficient to put a man on security under this section. There should be clear evidence on the record to show what exactly he had been doing and how he had been living. Where there is strong evidence of apparently respectable men on the record to show that a person has not in recent times lived a disreputable life and such evidence has not been rebutted, security under this section ought not to be demanded—1916 P. L. R. 30.

Very clear and full evidence, with as much detail as possible, should be required before making an order under this section—9 A W N 114, and materials ought not to be brought on the record which are not legally admissible in evidence, and which are liable, if on the record, to prejudice the accused—20 Cr L J 689

The Court (whether original or appellate) must show by its judgment that it has duly weighed and examined the evidence for and against the accused in the case. Where therefore in a proceeding started under S 110, Crim Pro Code, the judgment ran "It is obvious that if one quarter of the evidence for the prosecution is true—and I see no reason to doubt that it is,—the appellant is a most proper person to be bound over under S 110 Crim Pro Code," held that the judgment was bad and must be set aside and the case sent back for retrial—18 Cr L J 649 (Oudh). Where the Appellate Court in a case under this section wrote a judgment of four lines without giving even an indication of the fact that he had weighed the evidence for and against the accused, held that there had not been a proper trial of the case, and that it should be retried—14 A L J 279

An admission by the accused that he is a man of bad character and had been in jail is not sufficient—3 Bom L R 269. The report of a Police officer (5 W R 2 to W R 55) or the report of a Subordinate Magistrate (6 B H C R 1, 5 B H C R 105), or the uncorroborated evidence of an approver in a previous case (5 L B R 72 21 Cr L J 170 Cal) is not sufficient.

The mere fact that some of the witnesses produced by a person against whom proceedings have been instituted under sec 110 are his caste fellows or friends or associates is not by itself a sufficient reason for discrediting their testimony—6 O L J 541=21 Cr L J 60, 22 O C 375, 18 A L J 1114, 20 A L J 881

Police evidence—In proceedings under this section, the evidence of official and Police witnesses should as far as possible be eschewed. Though there is no rule of law which prohibits a Magistrate from admitting Police evidence it should, if not wholly discarded, influence his judgment as little as possible. Where the evidence of the police witnesses consists only of rumours and hearsay which they have recorded in their note books and diaries, it is wholly inadmissible—43 Mad 450. Entries in the Thiruv Village Crime Note Book are in themselves no evidence to support an order under this section—22 Cr L J 486 (Cal)

The history sheets kept by the Police of persons proceeded against under this section cannot be taken into consideration by the Court. A Magistrate should not delegate his judicial functions to the Police—21 Cr L J 700 (Cal)

A list of cases in which the accused was suspected of having been concerned is inadmissible in evidence—21 O C 132.

Mere suspicion is not evidence.—Where the only evidence against the accused was that he was a man of bad character and was suspected on many occasions by the Police, an order under this section could not be sustained—25 A W N 31 Persons ought not to be bound down on the mere statement of witnesses that they suspect the accused to be a thief or a dacoit—11 C W N 413 There should be clear evidence against a man before he can be called upon to furnish security The fact that he was once convicted of theft, and his house was searched on several occasions (but no stolen property was found) does not justify an order under this section—1907 P L R 23

When the evidence is good and equally balanced on both sides, no order for security shall be made—11 A L J 461, 20 Cr L J 716 (All) 4 Lah L J 531 Thus where there is a large volume of evidence in favour of the accused which is as good as, if not better than, that of the prosecution, there is no ground of making an order under this section—4 Lah L J, 531.

Onus of proof—The burden of proving the bad character of an accused is on the prosecution, and therefore when the evidence on both sides is of an indifferent and interested character, the prosecution must fail—1903 P R 27

Evidence of habit—The persons mentioned in this section are those who are *habitual* criminals and the *habit* is to be proved by an aggregate of acts—6 M H C. R 120

The fact that a person has been convicted on a former occasion is not sufficient to justify the finding that he is an *habitual* offender, unless there is some additional evidence to show that he has again done some acts that indicate an intention on his part to return to his former course of life—2 All 835, Oudh S C No 70, and it is necessary to prove that the subsequent offence charged was committed by the accused after his previous conviction—Ratanlal 143 A person who was previously bound over to be of good behaviour under this section, cannot, soon after his release, be handed up again on vague evidence of suspicion without any tangible evidence to show that he has been leading a life of crime A convict should be given sufficient opportunity to reform himself before he is handed up again—18 Cr L J 710 (Oudh), 31 Cal 783 43 Cal. 1128, U B R. (1915) 31d Qr 86=17 Cr. L J 85

Evidence of acts of misconduct committed by a person years ago is admissible as indicating formation of habit But such evidence unless supplemented by evidence of misconduct committed by such person

ed and he was arrested on several occasions, such a suspicion is not sufficient evidence against the accused. Where there is positive evidence for the defence that the accused is a good man, it is not a sufficient reason for casting it aside to say that proof of malice against the accused on the part of the prosecution is wanting—21 Cr L J 170 (Cal).

But an evidence that a person had been suspected and named in a large number of cases extending over a considerable interval may be very useful corroboration of general evidence against him. Conversely in a doubtful case, the fact that a person has never been suspected of any offence may weaken the general evidence of reputation that is given against him—22 Cr L J 273 (Oudh).

Mere rumour is not repute, evidence of rumour is mere hearsay evidence of a particular fact, evidence of repute is a totally different thing. Rumours in a particular place that a man had done particular acts or has characteristics of a certain kind are not evidence of general repute—23 Cal 621, 1 A L J 611, 1918 M W N 751. Evidence of association with bad characters is evidence of reputation but such reputation can only be based upon association with proved bad characters, and not with reputed bad characters—13 C W N 318.

In order to establish general repute for the purposes of section 117, the evidence of the investigating police officer is inadmissible and irrelevant—1 P L T 632.

Duty of Court to test the evidence — The fact that a man is a habitual offender may not always be proved by actual previous convictions, and it is necessary to prove it by evidence of general repute. But the Magistrate should take great care, where no previous conviction is proved, to test the evidence for the prosecution and assure himself beyond reasonable doubt that the accused is really a habitual offender of the class named. The Magistrate cannot convict a person on mere vague evidence of bad repute—2 Bom L R 57, 1 Bur S R 542. Where the evidence for the prosecution is of a vague character, and when a case has to be established merely upon evidence of bad repute, the Court should take into consideration the value and weight of evidence tendered on behalf of the prosecution as compared with that for the defence—12 Cr L J 542 (Oudh).

Evidence should be tested by its quality rather than by its quantity. When the evidence on the side of the prosecution and the defence is found to be of an indifferent character, the prosecution must fail. If the quality of evidence is good on both sides the case must also fail, if the evidence for the defence over balances that for the prosecution—1898 P. R. 4, 27 Cal 781, 11 A L J 461.

Magistrate bound to examine all witnesses —In a proceeding under this section the Magistrate is bound to examine all the witnesses produced by the accused. Where the trying Magistrate declined to examine on behalf of the defence more than the same number of witnesses as were examined for the prosecution, *held* that it was not open to the trying Magistrate to put such an arbitrary limit on the witnesses whose evidence the defence desired to adduce—22 C W N 408

Proof of previous convictions —Whenever it is required to prove previous convictions against a man in a proceeding under this chapter, such previous convictions must be proved strictly and in accordance with law, unless they are so proved, no Court can properly take such previous convictions into consideration against an accused person 43 Cal 1128

Further Inquiry —Under Sec 436, a District Magistrate has jurisdiction to direct further inquiry in a case where a person has been discharged in an inquiry under Sec 110—20 Cr L J 704 (All). But further inquiry should not be directed merely on the ground that the District Magistrate happens to take a different view of the evidence which was before the trying Magistrate from that which the trying Magistrate himself took—44 All 691

Order for security —*Object* —The provision of law which requires sureties for the bond is made not with a view to obtain money for the Crown by the forfeiture of recognizances, but to ensure that the particular accused person shall be of good behaviour for the time mentioned in the order—20 All 206, 10 Bom 174. Therefore an order under this section requiring persons to deposit cash in lieu of entering into a bond or giving security for the future good behaviour is bad in law—6 Cal 14

Nature of order —Under this section the Magistrate can pass an order directing the person to give security. But an order directing that the person must leave the town at once or he will be prosecuted as a bad character is illegal and *ultra vires*—19 A L J 931

Expiry of term of bond—Fresh security —Where a bond for good behaviour expired on the 13th of June 1905 and on the 20th June fresh proceedings were started against him, it was held that the order was illegal in as much as the accused was not given a sufficient opportunity of showing that he was willing to adopt an honest livelihood and the interval was not long enough to see whether the accused has reformed his course of life or not—28 All 306. So also, where the accused was imprisoned for one year for failure to furnish security, and about 15 months afterwards, fresh proceedings were instituted against him as a result of which he was ordered to execute a bond for good behaviour,

it was held that the order was bad, that the accused has not had a sufficient locus penitentie and that the evil reputation which he had before his imprisonment still followed him and permeated the evidence of many of his witnesses—31 Cal 783, 43 Cal 1228, (1915) U B R 3rd Qr 86 But if upon being set at liberty he returns to his former course of life, a further order may be passed requiring him to furnish fresh security—6 W R 18

Magistrate to state grounds —On a requisition from the High Court, the Magistrate is bound to state the grounds upon which he fixed the amount of security Where the amount of security is *prima facie* unreasonable, the High Court can call upon the Magistrate to state the grounds for fixing that amount—2 Cal 384, 2 Cal 110

Error in form of bond —Where a bond was executed, under a mistake, in the form of bonds required to be entered into under section 107, while a bond under section 110 had been ordered it was held that the bond was void and the error could not be rectified under section 537—1903 P R 31

Order to state on which clause it is based —On the conclusion of the inquiry if the Magistrate considers that the accused is a person falling within any of the descriptions stated in this section he should record a distinct finding of the specific description which he considers proved If the finding be insufficient the final order based upon it will be open to reversal The same will be the case if the finding be that he is a habitual thief (or dacoit) but the finding is not supported by evidence that the misconduct is habitual—Punjab Circ p 167

Remand to custody —Where proceedings are instituted under this section, the Magistrate can remand the accused person to custody See notes under section 167

Revision —In questions arising under Sec 110 and Sec 107, the moment it is shown *prima facie* that there is something which the Courts below have done either in excess of their powers or by a too summary exercise of their powers, or by misapplying the rules of evidence or by not giving due effect to the evidence for the defence, an application for revision should be admitted But the High Court will not generally interfere on the merits except in very exceptional cases, because it is idle to suggest that the High Court, sitting with only the paper evidence before it, should presume to differ on questions which are purely questions of fact and questions depending on the demeanour of witnesses—17 Cr I J 461 (All) The High Court is not a Court of appeal for the purposes of section 110, and it is only in a very rare case that it will interfere—20 Cr L J 639 (All) But at the same time, the administration

of this section has to be very carefully watched, and where evidence has been mis-stated or omitted or great difficulties have not been seen or the rules of evidence have not been followed and the Judge has reviewed the case in a very perfunctory way without pointing out the palpable defects in the evidence, the persons appear as if a man has been hounded down requires to be carefully watched—20 A L J 678. See also notes under sec. 115.

Previous acquittal—Where an accused is being tried by a Magistrate under Sec. 106, and it is held that in a previous case of exactly the same nature he was acquitted by the Court of Sessions it is not for the Magistrate to question in his judgment the decision of the Sessions Judge—20 Cr L J 727 (All).

Order under Punjab Act V of 1918—An order restricting movements under the provisions of the Punjab Act V of 1918 (Restriction of Habitual Offenders Act) cannot be passed against any person from whom a security has been taken under this section—1919 P L R 34, 1 Lah 500.

Criminal Tribes Act—Proceedings under this section against persons who have been registered under sec. 4 of the Criminal Tribes Act (III of 1911) are not illegal. But such proceedings though not illegal are inexpedient and the fact that the persons proceeded against are already registered under the Criminal Tribes Act may be a factor and an important factor which the Magistrate should take into consideration before he makes any order against them under section 110 of this Code—20 Cr L J 30 (Cal).

111 [Repealed]

This section has been repealed by section 8 of the Criminal Law Amendment Act (XII of 1923). It ran as follows—

"111. The provisions of sections 109 and 110 do not apply to European British subjects in cases where they may be dealt with under the European Vagrancy Act, 1874."

112 When a Magistrate acting under section 107, section 108, section 109 or section 110
Order to be made deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required

Order in writing —A Magistrate acting under this Chapter has no power to act until he has recorded an order in writing under this section —36 All 262 The issue of a warrant under Sec 115 without recording an order under this section is illegal—2 Weir 55 So also, where the accused persons were arrested as suspected habitual thieves and the Magistrate fixed a date for the production of evidence with the object of issuing a notice under section 112 but on the date fixed, after hearing the prosecution evidence, he at once called upon the accused to enter upon their defence to a charge under section 110 *held* that the procedure was illegal and the proceeding must be set aside It is only after the Magistrate has recorded an order under sec 112, that the actual hearing can by law take place at all—42 All 646

In O C 366, however, it has been held that the provisions of this section are purely directory, and a failure to record the order is a mere irregularity But this view does not appear to be correct, for the words of the section are 'he *shall* make an order in writing' In 1919 M W N 639 it was held that the omission to draw up a proceeding under this section or to serve a copy of the order on the accused under section 115 did not vitiate the proceedings, if the order was drawn up later and read out and explained to the accused who appeared in Court in pursuance of summons,

The order in writing must fully comply with the provisions of this section Though it does not follow that non compliance with any of its provisions will vitiate an enquiry under Sec 117, still it is desirable that Magistrates in the performance of their duties should attend strictly to the provisions of law—5 O C 313 Where the defect in the preliminary order did not prejudice the accused in the trial and he let in all his evidence the proceedings would not be quashed on the ground of the defect—43 Mad 450

Contents of the order —The Magistrate should be very careful in drawing up the preliminary order, bearing in mind the provisions of Sec 118, which will not allow the final order to be at variance with the preliminary order passed under this section

(a) *Substance of the information* —This should be stated with sufficient fulness for the accused person to have a clear understanding of the matter that he has to meet in his defence—Lunj Cir, Chap XIV, p 166 Under this section, the substance of the report made to the Magistrate should be clearly disclosed to the accused and if the accused is not informed of the charges or of the nature of the evidence which he is to rebut, the proceedings are illegal—43 Mad 450 Thus a notice under section 110 must contain something more than a mere reproduction of the clauses of the section There should be sufficient indication of the

time and place of the acts charged and sufficient details which would enable the accused to know what fact he is to meet—1918 M W N 751, 43 Mad 450

The parties are entitled to something more than a *mere assertion* in writing by the Magistrate that he has been informed that an offence (e.g. a breach of the peace) is likely to be committed, in order to enable them to bring evidence to rebut the truth of such information—6 All 214, 11 Cal 13. The parties are entitled to know the nature of the accusation they have to meet and to a reasonable opportunity within which to prepare themselves to meet the accusation and to cite witnesses—11 Cal. 43, 6 All 214, 43 Mad 450

Merely informing an accused person that he is suspected to be a habitual thief is not a sufficient notice. There must be something in the nature of an indictment or charge containing substantial particulars indicating the grounds upon which the police have given information to the Magistrate—42 All 646

The Magistrate should give notice to the accused of the particular conduct complained of—11 W R 35. Thus, in proceedings under section 110 an order by the Magistrate stating that he has received information that the accused is a habitual cattle thief and a receiver of stolen goods, is a sufficient compliance with the provisions of this section—16 A W N 73. In a proceeding under section 107, the Magistrate may give only the substance of the information received, and it is not necessary to specify the definite acts which the accused intends to commit—16 A L J 567

But a Magistrate is not bound to give the source of the information—1 A L J 685, 29 Cal 392. It is also not necessary to give a list of the witnesses in the order—35 Cal 243.

The *omission* to set forth the substance of the information will not of itself be sufficient to set aside the Magistrate's order, unless the accused has been prejudiced by the omission and a failure of justice has been occasioned—15 W R 43, 3 All 545, 8 Cal 724, 11 A W N 40. The omission in the notice to give detailed information as to the nature of the evidence for the prosecution is not an irregularity sufficient to vitiate the proceedings especially if the accused had cross examined at great length the witnesses for the prosecution—20 Cr L J 436 (Pat) or if as a matter of fact the accused had clear notice of the case made against them and had ample time and opportunity to let in evidence—23 Cr L J 42 (Pat)

(b) *The amount of bond*—The summons (i.e. the order in writing which is to accompany the summons under section 115) should strictly

specify the amount and the nature of the security required and the time for which the security is to run—20 W. R. 26

The amount should not be excessive, see Sec 118

Omission to specify the amount of the recognizance and surety is an irregularity which does not vitiate further proceedings—8 Cal 724.

(c) *The term of the bond*—The order should set forth a definite period for which security is to be demanded—3 Mad 238 But this term should not be unnecessarily lengthy Thus, where a disturbance of the peace was apprehended in a fair which was to last for a fortnight, an order demanding security for a period of one year is unnecessary and excessive—6 All 214

(d) *Number, character and class of sureties*—The Magistrate in setting forth the number, character and class of sureties, should not place undue and unnecessary difficulties in the way of finding them See Cal. H. C. Pro 29th March, 1879, 22 Cr. L. J. 395 (All)

Therefore, a Magistrate has no right to impose a condition requiring the accused to find sureties residing within certain geographical limits (e.g. within one mile or five miles) or residing in a certain locality—24 W. R. 37, 1880 P. R. 30, 7 A. L. J. 993, 10 A. L. J. 354, 20 A. L. J. 520, 6 O. C. 199, or to impose a condition that the sureties must be inhabitants of one village—1915 U. B. R. 3rd Qr 86

In 24 All 471 it has been held that the Magistrate is entitled to prescribe certain geographical limits for the residence of sureties but it must not be too narrow, and therefore where an order was passed requiring the sureties to be "residing within the Municipality of Mirzapore" the High Court added the words "or in the immediate neighbourhood"

But of course it is reasonable to expect and require that the sureties must not live at such a distance as would make it unlikely for them to exercise any control over the accused—20 All 206, and so where the sureties lived at a distance of 13 miles, they were rejected—18 A. W. N. 199, 15 A. W. N. 143

Lastly, as regards the *class* of sureties Since section 112 gives the Magistrate power to define the character and class of sureties, it is open to him to require that they shall be *inholders*—20 All 206, 16 Bom. L. R. 138, 8 S. L. R. 229, or that they should be of respectable character and should not be of inferior standing to suspects—8 S. L. R. 173 But a condition that the sureties must not be *limbirds*, *inminds* and *Choklirs* (1906 P. R. 18) or that they must not come from *Kaharati* and must not be *kunhi* by caste (1 Bom. L. R. 50) is too restrictive and illegal.

As regards inquiry into the fitness of sureties and their rejection, see section 122

113 If the person in respect of whom such order is made is present in Court, it shall be read over to him or, if he so desires, the substance thereof shall be explained to him

Procedure in respect of person present in Court — Even if persons are illegally arrested and brought into Court, the Magistrate may proceed to initiate proceedings — 12 Cr L J 533 (Bom)

114 If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or, when such person is in custody, a warrant directing the officer in whose custody he is, to bring him before the Court

Summons or warrant in case of person not so present — Provided that whenever it appears to such Magistrate, upon the report of a police officer or upon other information (the substance of which report or information shall be recorded by the Magistrate), that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest

Issue of summons — *Where summons unnecessary* — Where a charge of criminal trespass and mischief was dismissed, and the Magistrate recorded an order in the presence of both parties calling on them to show cause on a day fixed why they should not furnish security for keeping the peace, it was held that it was not necessary to issue a summons to them — 2 B L R App 26

Where fresh summons necessary — Where a Magistrate issued a notice with reference to section 110, but at the time of inquiry passed an order demanding security under section 107 it was held that the Magistrate ought to have issued a fresh notice with reference to section 107, to enable the party to know the facts on which the Magistrate intended to proceed against him — 30 Mad 282 (cited under section 110)

Notice must give time — The notice issued to the accused to appear and show cause must give him time to produce his evidence. So where notice was served on the 7th, requiring the accused to appear on the 9th,

it was held that sufficient time was not given, and the order for security was set aside—22 W R 70

Issue of warrant —The procedure prescribed in the proviso must be strictly followed. Where an accused person is not sent before a District Magistrate by any other Magistrate under sec 107 (3) so as to bring the case under 107 (4), such District Magistrate's order detaining him in custody is one made without jurisdiction. Even assuming that the proviso to sec 114 applies to the case of a person who is before the Court an order of the Magistrate cannot be supported under this section where he has not followed the procedure herein prescribed—31 Mad 315

To justify an arrest under this section the Magistrate must act upon information that has been recorded. It is not enough for him to merely state that such a course is necessary. Not only must he have reason to fear the commission of a breach of the peace but it must also be shown that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person—6 All 132

Bail A Magistrate has no jurisdiction to refuse bail to an accused person arrested under a warrant issued under this section—9 S L R 158 20 Bom L R 121. When a man who is arrested is not accused of a non-bailable offence, no needless impediments should be placed in the way of his being admitted to bail. The intention of the law undoubtedly is that in such cases the man is ordinarily to be at liberty and it is only if he is unable to furnish such moderate security if any is required of him as is suitable for the purpose of securing his appearance before a Court pending inquiry, that he should remain in detention—20 Bom L R 121

Person outside jurisdiction —A Magistrate cannot legally issue a warrant under this section for the arrest of a person who has already left the local limits of his jurisdiction. The person proceeded against must be actually and physically present in the district in which the Magistrate exercises jurisdiction—14 Bom L R 889. But see 46 Cal 215 where it is held that section 114 is not limited to arrest within the local limits of the Magistrate's jurisdiction but applies to an accused arrested outside the jurisdiction and brought in custody within the jurisdiction for the purpose of proceeding under this chapter. See notes to section 110 under heading Within the Magistrate's jurisdiction

115 Every summons or warrant issued under Section

Copy of order under
Sec 114 to accompany
summons or warrant

114 shall be accompanied by a copy of

the order made under Section 112 and such copy shall be delivered by the officer serving or executing

ing such summons or warrant to the person served with, or arrested under, the same

Omission to send copy of order—When the summons was not accompanied by a copy of the order passed under section 112, the whole proceedings are invalid and the order for security must be set aside—17 M L J 438; 2 Weir 55, U B R. (1897—1901) 16 *Contra*—11 Bom L R 740, where such omission was held to be a mere irregularity, cured by Sec. 537. See also 1919 M W N 639 and 1 P L T 632, where it has been held that an order for security is not liable to be set aside merely because no proceeding was drawn up and served on the accused, provided that an order under sec 112 was drawn up later and read out and explained to the accused when they were brought into Court in pursuance of summonses

116 The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace, and may permit him to appear by a pleader

Power to dispense with personal attendance

Where the person against whom proceedings were taken lived at a distance, and there was no special circumstance making his personal attendance necessary, it would be a very unwise exercise of jurisdiction to require him to appear personally, seeing that the Magistrate could under this section allow him to appear by a pleader—12 Cal 133

The words 'bond for keeping the peace' imply that this section applies only to a case under Sec 107

117 (1) When an order under Section 112 has been read or explained under Section 113 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant issued under Section 114, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary

Inquiry as to truth of information

(2) Such inquiry shall be made, as nearly as may be practicable, where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons cases,

and where the order requires security for good behaviour, in the manner hereinafter prescribed for conducting trials and recording evidence in warrant-cases, except that no charge need be framed.

(3) *Pending the completion of the inquiry under sub-section (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence, or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under S. 112 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the enquiry, and may detain him in custody until such bond is executed, or, in default of execution, until the inquiry is concluded:*

Provided that—

(a) *no person against whom proceedings are not being taken under Section 108, Section 109, or Section 110 shall be directed to execute a bond for maintaining good behaviour, and*

(b) *the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability shall not be more onerous than those specified in the order under Section 112.*

(4) For the purposes of this section the fact that a person is an habitual offender *or is so desperate or dangerous as to render his being at large without security hazardous to the community* may be proved by evidence of general reputation or otherwise.

(5) Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just.

Change :- Subsection (3) and the italicised words in sub-section (4) have been added by sec. 19 of the Criminal Procedure Code Amendment

Act (XVIII of 1923) The reasons are stated below. Sub sections (3) and (4) have been renumbered as (4) and (5)

Subsection (1)—Inquiry into truth of information—Under this section a Magistrate is bound to enquire into the truth of the information, notwithstanding that the accused consents to furnish security—U B R (1902-3) 1 If, however, the accused admits the truth of the information, the Magistrate need not proceed with the inquiry—11 W R. 50

The inquiry to be held under this section is a full judicial inquiry—18 W. R. 2 It must be conducted judicially, and becomes a judicial proceeding All the formalities of a judicial proceeding have to be observed in the inquiry—1899 P R 10 The object of the inquiry is that the accused should have an opportunity to exculpate himself—20 W. R. 18; 4 M H. C R App 22

Place of inquiry—The inquiry should, wherever possible, be held in the village where the parties reside, so as to avoid witnesses being needlessly harassed and to enable the accused without difficulty to procure the attendance of persons willing to speak in his favour—1 Bur. S. R 546 The inquiry should not be held in a place outside the local limits of the Magistrate's jurisdiction; if he does so, the order passed thereon is void—3 C L J 195

Procedure—Summoning witnesses—It is quite clear that the accused person when appearing to show cause must be ready with his evidence. "Showing cause" is not merely putting in a written statement or making a verbal statement, but the supporting of that statement by such evidence as he may be able to produce He may bring his witnesses with him if he likes—23 W. R. 9 If he has been unable to bring the evidence with him on account of the shortness of the notice or other reasonable cause, it is his duty, when he appears, to apply at once for summons to the witnesses he proposes to call—9 Bom. L R 1385, 23 W R 9 A Magistrate is bound to assist both parties in bringing their witnesses by issuing summons to attend—22 W. R. 70

The accused person must be given sufficient time to bring his witnesses and have their evidence recorded. Where the accused has not had this opportunity, the order against him must be set aside—41 Cal 806, 22 W R 70, 6 All 214

The enquiry ought to be conducted with attention to the ordinary form of justice The defendant should have every opportunity of cross examining the witnesses produced against him, of making his own statement, and of calling witnesses on his behalf—4 M. H. C R. App. 22.

and where the order requires security for good behaviour, in the manner hereinafter prescribed for conducting trials and recording evidence in warrant-cases, except that no charge need be framed.

(3) *Pending the completion of the inquiry under sub-section (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence, or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under S. 112 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the enquiry, and may detain him in custody until such bond is executed, or, in default of execution, until the inquiry is concluded :*

Provided that—

(a) *no person against whom proceedings are not being taken under Section 108, Section 109, or Section 110 shall be directed to execute a bond for maintaining good behaviour, and*

(b) *the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability shall not be more onerous than those specified in the order under Section 112.*

(4) *For the purposes of this section the fact that a person is an habitual offender or is so desperate or dangerous as to render his being at large without security hazardous to the community may be proved by evidence of general repute or otherwise*

(5) *Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just.*

Change : Subsection (3) and the italicised words in sub-section (4) have been added by sec. 19 of the Criminal Procedure Code Amendment

of the disputed land, passed in the absence of the former, is bad in law—1 C L R 48 See this case cited under section 202

Power to proceed under section 202—A Magistrate before whom an inquiry is pending under this section is not competent to take action under Sec 202, after the person has been called upon to show cause—16 A W N 140 See this case cited under Section 202

Further evidence—The words 'further evidence' indicate that some evidence may be taken by the Magistrate even before drawing up the preliminary order under section 112—U B R (1905) CR P. C 29

The Magistrate trying a case is bound by law to hear those witnesses only whose list is sent up by the Police along with the case, and as soon as the witnesses produced in support of the case have been heard, the Magistrate is then to ascertain the names of the persons likely to be acquainted with the facts of the case, and shall summon to give evidence only such of them as he thinks necessary. He is not bound by law to, and should not, save in very exceptional cases, call the other witnesses that the police or any one else may from time to time choose to produce—12 A L J 261

In a proceeding under this section it is erroneous on the part of the Magistrate to admit fresh evidence for the prosecution after the close of the defence case. No further evidence can be admitted except under Sec 540, for which valid reasons must be recorded—10 A L J 383

Subsection (2)—Form of procedure—An inquiry in a proceeding for security to *keep the peace* must be made in the same way as in a trial in a summons case—25 All 273 See also Cal G R & C O page 82. The Magistrate must proceed as nearly as practicable in the same way as under Sec 242. He must state to the accused the particulars of the matter against him and ask him if he can show cause why he should not be required to execute bonds. The question 'are you willing to execute the bond' answered by a statement that the accused would execute bonds is not a sufficient compliance with this Section—34 Mad 139

An inquiry in a *good behaviour* case must be conducted as if it were a warrant case, and the procedure in Secs 251-258 must be followed. Therefore an accused person cannot be called upon to enter on his defence until the prosecution closes its case—10 A L J 383 In 35 Cal 243, however, it is held that the procedure prescribed for warrant cases is 'as nearly as possible' to be followed but it does not follow that that gives a right to the accused person to further cross examine the prosecution witnesses on entering upon his defence when he has once cross examined them.

Sub section (3)—'This subsection has been added to enable the Magistrate in emergent cases to take immediate steps to preserve

Examination of witnesses —The Magistrate is bound to examine all the witnesses produced by the accused. Where the Magistrate declined to examine on behalf of the defence more than the same number of witnesses as were examined for the prosecution, it was held that the Magistrate was wrong in imposing such arbitrary limit on the number of witnesses adduced by the defence—22 C. W. N. 408

Where the Magistrate before whom some of the prosecution witnesses have been examined is transferred, and is succeeded by another Magistrate, the accused has a right to ask for the resummoning and rehearing of those witnesses—4 C. L. R. 452

The Magistrate is bound to weigh all the evidence adduced on either side. Where the Magistrate, in a case under section 110, wrote a judgment of four lines without even giving an indication of the fact that he had weighed the evidence for and against the accused, it was held that there had not been a proper trial, and the case must be retried—14 A. L. J. 279

Where the accused who was a Zemindar and money lender produced a large number of witnesses consisting of his own caste fellows and tenants to depose to his good character, but the Magistrate disbelieved the evidence simply on the ground that by virtue of his position he could produce a large number of witnesses, and assigned no other legitimate reason, it was held that the case had not been approached from a proper point of view, and the High Court could interfere in revision—13 A. L. J. 1046. The Court must pay proper attention to the evidence and should find substantial reason for not believing the evidence—13 A. L. J. 1055

Defence by Pleader —Since the person against whom proceedings have been initiated under this section is an "accused" person, he has a right to be defended by a pleader—23 Cal. 493, 25 All. 375. Under section 340 as now amended the person proceeded against under this section has been expressly given a right to be defended by a pleader. See notes under sec. 340.

Recalling witnesses —Although in a good behaviour case the procedure of warrant cases is to be followed, still the accused is not entitled to invoke the aid of Sec. 256 and to ask the Court to recall the witnesses, who have given evidence against him, for further cross examination—1916 P. R. 1. But in 43 Mad. 510 it is held that the accused has that right.

Order —Where the inquiry under this section was made by one Magistrate and the order for furnishing security was passed by another, the order was illegal and set aside—5 A. W. N. 30.

An order for security cannot be passed *ex parte*. An order demanding security from one party, and directing the other party to retain possession

of the disputed land, passed in the absence of the former, is bad in law—1 C L R 48 See this case cited under section 202

Power to proceed under section 202—A Magistrate before whom an inquiry is pending under this section is not competent to take action under Sec 202, after the person has been called upon to show cause—16 A W N 140 See this case cited under Section 202

Further evidence—The words 'further evidence' indicate that some evidence may be taken by the Magistrate even before drawing up the preliminary order under section 112—U B R (1905) CR P C 29

The Magistrate trying a case is bound by law to hear those witnesses only whose list is sent up by the Police along with the case, and as soon as the witnesses produced in support of the case have been heard, the Magistrate is then to ascertain the names of the persons likely to be acquainted with the facts of the case, and shall summon to give evidence only such of them as he thinks necessary. He is not bound by law to, and should not, save in very exceptional cases, call the other witnesses that the police or any one else may from time to time choose to produce—12 A L J 262

In a proceeding under this section it is erroneous on the part of the Magistrate to admit fresh evidence for the prosecution after the close of the defence case. No further evidence can be admitted except under Sec 340 for which valid reasons must be recorded—10 A L J 383

Subsection (2)—Form of procedure—An inquiry in a proceeding for security to *keep the peace* must be made in the same way as in a trial in a summons case—25 All 273 See also Cal G R & C O page 82 The Magistrate must proceed as nearly as practicable in the same way as under Sec 24. He must state to the accused the particulars of the matter against him and ask him if he can show cause why he should not be required to execute bonds. The question 'are you willing to execute the bond' answered by a statement that the accused would execute bonds is not a sufficient compliance with this Section—34 Mad 139

An inquiry in a *good behaviour* case must be conducted as if it were a warrant case, and the procedure in Secs 251-258 must be followed. Therefore an accused person cannot be called upon to enter on his defence until the prosecution closes its case—10 A L J 383 In 35 Cal 243 however, it is held that the procedure prescribed for warrant cases is 'as nearly as possible' to be followed but it does not follow that that gives a right to the accused person to further cross examine the prosecution witnesses on entering upon his defence when he has once cross examined them.

Subsection (3)—This subsection has been added to enable the Magistrate in emergent cases to take immediate steps to preserve

the public peace or for the public safety by taking surety pending the detailed inquiry *Statement of Objects and Reasons* (1914). In the Bill of 1914, provision was made only for the execution of a bond for keeping the peace but the Joint Committee in 1922 provided for the execution of a bond for good behaviour as well. 'We approve of the principle of the new sub section (3) of section 117 which, as an alternative to the immediate arrest allowed by the proviso to section 114, enables a Magistrate to make an interim order for security. But we see no reason why the interim order should not be in certain cases one for security for good behaviour, provided that an order of this nature is not made in proceedings under section 107'—*Report of the Joint Committee* (1922).

Subsection (4)—Evidence of general repute—See this subject fully discussed under section 110.

Prior to the amendment of this sub section evidence of general repute was admissible only in those cases where the person was a habitual offender within the meaning of clauses (a) to (e) of section 110. It could not be adduced to prove under clause (f) of that section that a man is a desperate and dangerous character—19 Cr L J 871 (Nak), 43 Mad 450, 29 Cal 779, 9 O C 69, 25 A W N 41, 11 C W N 789, 5 C W N 249, 1917 P W R 8. These rulings are no longer good law in view of the Amendment of sub section (4) of the present section which now allows evidence of general repute to be given to prove a man to be a desperate and dangerous character.

But evidence of general repute is not admissible in a case where a person is called upon to furnish security under section 107 of the Code—25 All 273, 1888 P R 16.

'Or otherwise'—According to the general rule of interpretation the word 'otherwise' must be read as meaning something *ejusdem generis* with the particular or particulars alleged about it. Applying the *ejusdem generis* principle of interpretation the nearest approach to the particular general repute would be hearsay evidence not amounting to general repute—24 A W N 140. It seems difficult to interpret the word 'otherwise' in the sense in which the law would ordinarily read it but it is clear that the intention of the Legislature is that the Magistrate should use very large discretion as to the evidence which he may admit in the proceedings—*Ibid*.

The expression 'or otherwise' would include statements made by some of the co accused amounting to a confession of the actual commission of the offence and incriminating the other accused—41 All 231.

Sub section (5)—Associated together—The words 'associated together' apply to persons acting in concert whether that concert due to mutual agreement amongst themselves, or the order of a common

master—9 C W N 898 (per Geidt J) The words mean conspiracy or action in concert—25 C W N 334 Thus, where it was clearly established that the accused who were father and sons formed a gang, and the evidence against them was all the same, they could be said to have been associated together and could be dealt with in the same inquiry—13 C W N 244

The fact that persons are members of an undivided family would not by itself render each member liable for the misconduct of any other member The test to be applied is whether there has been habitual association between the persons charged in respect of the misconduct alleged in the complaint—1918 M W N 751

Where no such association is proved a joint inquiry is improper, but the trial need not be set aside, unless it is shown that the accused was actually prejudiced or that the trial led to an improper order being passed—9 O C 69 9 All 452

Even where the association of the several accused is established satisfactorily, the Magistrate has a discretion to try the accused jointly or separately—27 Cal 781

Association, what is not—In the absence of any evidence to prove that the persons constituted a gang the mere fact that they belonged to one tribe and village with a bad name is not sufficient evidence of association, and therefore they cannot be tried jointly in one and the same proceeding—1895 P R 1 Thus, the fact that the accused persons are close neighbours and had been previously implicated in good many cases together does not lead to the inference that they were associated together in the particular offence under inquiry, and does not justify a joint trial of them all—21 Cr L J 700 (Cal)

The word 'association' cannot apply to such cases where the offence is purely *personal* to the offender For instance the question whether the person is a habitual thief or not is personal to himself and forms a separate matter by itself So where four persons were charged under Sec. 110 (a) with being thieves by habit it was held that there was error in law in trying them all together—4 L B R 46

Again subsection (5) does not authorise a Magistrate to deal with persons charged under separate sections in one and the same inquiry. Thus, a person called upon to give security under section 109, and another person called upon to give security under sec 110 cannot be tried together in the same proceeding—8 O C 91 In other words association implies association in the *same* offence, and not in different offences

And lastly, two contending parties opposed to one another and inclined to commit an offence involving a breach of the peace cannot be said to have been associated together, and a joint trial of such contending parties is illegal—8 C W N 180, 31 Mad 276, 11 C W N 472, 14 A L J 268 But in 9 All 452 it has been held that such a joint trial is not *ipso facto* null and void, except where the accused has been prejudiced thereby

Joint Inquiry —*Separate finding and evidence* —Where proceedings are taken jointly against more persons than one under this subsection, the Magistrate must come to a *separate* finding as regards each of them *individually*—35 Cal 929, 37 Cal 91, 1895 P R 1, 37 All 33 The case of each person is to be considered on its own merits and it should not be allowed to be mixed up or prejudiced by that of the others—6 All 214

Each accused is entitled to an entirely independent examination of his own case—1909 P W R 25, and the judgment must show that the Magistrate has considered the case of each individual accused—37 Cal 91

The Magistrate must insist upon definite evidence being given against each person charged—15 O C 253 What is evidence against one cannot be treated as evidence against all others without discriminating between the cases of the various persons implicated—9 All 452 Thus where the evidence recorded by the Magistrate has bearing only on 11 out of 26 persons, called upon to show cause, his order binding down all the 26 persons is not valid, it is valid only as regards those against whom the evidence is relevant—10 C L R 335

118 (1) If, upon such inquiry, it is proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, with or without sureties, the Magistrate shall make an order accordingly

Order to give security Provided—

first, that no person shall be ordered to give security of a nature different from, or of an amount larger than, or for a period longer than, that specified in the order made under section 112,

secondly, that the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive.

thirdly, that, when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties

"If it is proved etc"—Evidence—These words show that an order under this section cannot be made without inquiry and *proof*—Ratanlal 585 The finding of the Magistrate must be based on clear and full evidence As much detail as possible should be required before making an order under this section—9 A W N 114 A finding in general terms that it is for the interest of the community at large that the accused should be bound down for good behaviour is not sufficient—27 Cal 656

It is not sufficient that the Magistrate is *morally* satisfied as to the necessity for security The Magistrate must give his reasons for finding it proved that security is necessary—to Bom 174

The mere fact that the accused person says that he is willing to give security to keep the peace is not the kind of proof required by this section as condition precedent to the taking of security—1917 P R 27, 1915 P R 24 When the accused denied the allegations but expressed his willingness to execute bonds, the order was held to be illegal in as much as the accused denied every allegation on the basis of which he was considered liable to furnish security and no evidence was taken to prove those allegations—20 Cr L J 105

As to the nature of evidence, see notes under Secs 107, 110

Procedure—An order under this section can be passed only after the procedure defined in sec 112 and the following sections has been gone through—Ratanlal 121, 2 Weir 56

Order for security—For general notes as to the object of security, the person to be bound, the demand for fresh security, see notes under secs 106, 107, 110

The object of this section is the prevention and not the punishment of offences and therefore a Magistrate ought not, when passing an order in terms of this section, to have any direct intention of inflicting punishment—7 All 67 Therefore, a Magistrate ought not to impose arbitrary conditions not essential for the object in view, which it would be impossible for the accused to fulfil, still less impossible conditions The order must not be tantamount to saying that the prisoner shall not furnish any security at all but must go to jail It is not in the power of the Magistrate to pass such order The object of the law is that the person charged shall furnish, if he can, good and sufficient security—22 W. R. 37

According to the first proviso to this section the final order must not be at variance with the preliminary order. Thus the Magistrate cannot vary the conditional order passed under Sec 112, by imposing further conditions in the final order—11 O C 267, 26 A W N 276. So also it is illegal to require a bond for good behaviour, when the notice was to show cause with respect to keeping the peace—25 Cal 798. Similarly the Magistrate is not competent to demand security with reference to Sec 110 when the preliminary order was with reference to sec 109—U B R (1897—1901) 24. (In such a case, the proper course is to institute fresh proceedings—*Ibid*). Again, the Magistrate is not justified in demanding the security for a larger amount than what was communicated to the accused in the preliminary order—1907 P W R 11, 18 W R 61, nor is he justified in demanding sureties when the summons made no mention of sureties at all—18 W R 61.

In cases where heavier security is deemed necessary, the Magistrate ought to issue fresh summons setting forth the amount intended to be taken—18 W R 61.

Moreover, the Magistrate cannot make the final order for security for a longer period than what was mentioned in the notice—26 Mad 471.

Supplementary order for larger security.—A Magistrate passed an order directing certain persons to furnish security in certain amounts. A month later, he passed another order directing that one of the accused should furnish security in a much bigger sum, and stating that he had overlooked that the accused had been called upon in the preliminary order to furnish a larger security. It was held that the second order was *ultra vires*. After the Magistrate had finished his case, it was beyond his power to alter the order—17 A L J 335.

Amount of security.—Under proviso (2), the amount of bond shall be fixed with due regard to the circumstances of the case and shall not be excessive—16 Bom 372, 6 All 214, 1 C L R 268, 2 Cal 110. In fixing the amount of security, the Magistrate should have due regard to the circumstances of the case, and the security should not be disproportionate to the ability of the accused to furnish it, with reference to his status in life—16 Bom 372, 1900 P R 17, 5 S L R 10, 22 W R 74, 4 M. H C R App 46. The amount should be such as to give the accused a fair chance of complying with the conditions of the security, and the Magistrate should not fix an amount for which there is a probability of the accused being unable to find security—1900 P R 17, 4 M H C R App 46, 2 Cal 384. When the accused is unable to give security for the amount required and remains in jail, it is an index that the Magistrate has not exercised a proper discretion in fixing the amount—23 All 80.

In fixing the amount the Magistrate should look to the means of the party himself and not to that of his master—22 W R 70, 1890 P R 30, 1900 P R 24, 1900 P R 17

House property as security —The accused was ordered under this section to furnish a bond for Rs 200 and a respectable surety. Such a surety came forward and offered security in the shape of house property worth Rs 500. The Magistrate rejected the security. It was held that the surety being respectable and the house being worth Rs 500 should have been accepted, though it was true that only moveable property could be attached and sold during the surety's lifetime for the recovery of the penalty—16 A L J 503

Minor —In case of a minor the bond shall be executed only by his sureties. See proviso 3. The reason for this proviso is no doubt the incapacity of the minor to contract—4 L B R 12

This proviso, however, does not apply to bonds of first offenders released on probation under Sec 562—4 L B R 12

Revision by High Court —The High Court is not a Court of Appeal for purposes of cases under section 110 and it is only in a very rare case that it will interfere—20 Cr L J 689 (All). The power to demand security from suspected persons is a power that is almost as much of an executive as of a judicial nature, and the jurisdiction with which the Magistrate is invested with regard to suspected persons is a very large one. It would be going counter to the spirit of the Code to give to persons ordered to furnish security a remedy in the nature of an appeal to the High Court, which has not been granted to them by the Legislature. Therefore the High Court will interfere with the orders passed by a Magistrate only on the very clearest and strongest grounds which demonstrate that there has been in the particular case a gross miscarriage of justice—1889 P R 23. Thus, the High Court will interfere in revision where there is no evidence on the record—1912 P L R 195, 14 A L J 215, or where there is nothing on the record to show that an inquiry as required by section 117 was held—37 All 30, 14 A L J 215, or where the judgment of the District Judge deciding an appeal under section 110 is a very short one and does not show that evidence was all examined and carefully weighed—14 A L J 279, 13 Cr L J 9 (All), or where the Magistrate disbelieved the evidence produced by the accused without any substantial reason—13 A L J 1046, 13 A L J 1055, or where the Magistrate has not given due effect to the evidence for the defence—17 Cr L J 461 (All), or where the Lower Appellate Court in hearing the appeal has not taken the trouble to rehear the case—17 Cr L J 461 (All).

Appeal —See sec 406.

119 If, on an inquiry under section 117, it is not proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made, should execute a bond, the Magistrate shall make an entry on the record to that effect, and if such person is in custody only for the purposes of the inquiry, shall release him, or, if such person is not in custody, shall discharge him.

"Discharge" —In 33 Mad 85, it has been held that the word 'discharge' means merely a permission to depart. It is not used in the same sense as it is used in Sec 437 (now 436) so as to enable further proceedings being instituted under that section against the person discharged under this section. See also 1911 P R 6; 19 A L J 985, 1914 U B R 3; 27 Cal. 662. But the contrary view is held in 24 All 148; 19 A W N 203; 21 All 107. See notes under Sec 436.

[This question depends upon the more general and much disputed question as to whether the person proceeded against under this chapter may be said to be an accused person or not. See notes under sec. 107.]

C—Proceedings in all Cases subsequent to Order to furnish Security.

120 (1) If any person, in respect of whom an order requiring security is made under section 106 or section 118, is, at the time such order is made, sentenced to, or undergoing a sentence of, imprisonment, the period for which such security is required shall commence on the expiration of such sentence.

(2) In other cases such period shall commence on the date of such order unless the Magistrate, for sufficient reason, fixes a later date.

After the expiration of the sentence —Under this section, a convict undergoing a sentence of imprisonment cannot be obliged to give security, until the imprisonment ends; nor can an order for imprisonment (under Sec. 123) in default be made till then.—Ratnald 765, 4 Bom. L R 934, 5 I B R 34; 22 Cr L J 95 (All), 15 S L R. 205. If in the meantime, he is convicted of another offence and sentenced to a fresh term of imprisonment, the order for security

should not be passed until after the expiry of both imprisonments—
Ratanlal 774

The accused was convicted under sec 147 I. P. C. but was released on bail pending an appeal against the conviction. While he was on bail, proceedings were taken against him under sec 110, of this Code and he was ordered to furnish security or in default to undergo imprisonment. His appeal was afterwards dismissed and the Magistrate ordered that as he was undergoing imprisonment in default of furnishing security, the sentence under sec 147 I. P. C. would commence after the expiry of the sentence under sec. 110 Cr. P. C. Held that the order was illegal, being in contravention of subsection (1) of this section—22 Cr. I. J. 95 (All.)

Subsection (2) —*Fixing later date* —The object of this subsection is to allow a Magistrate to grant time to the accused instead of at once proceeding to order imprisonment as if in default. This is shown by Sec. 123 which provides that the security may be given on or before the date on which the period for such security commences—4 C. W. N. 121

Fresh security —A second order requiring further security from the same person to commence on the expiration of the term of security already given, passed during the continuance of the first one, is not a proper order. If at the end of the period the act involving a breach of the peace is still continued, a further security can be demanded on fresh proceedings being properly taken—4 C. W. N. 121

121 The bond to be executed by any such person shall bind him to keep the peace or to be of good behaviour, as the case may be, and in the latter case the commission or attempt to commit, or the abetment of, any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond

Contents of bond

Breach of bond for keeping peace —A bond for keeping the peace will not be forfeited by the commission of any offence. It can be forfeited only by the commission of offences likely in their consequences to cause a breach of the peace. Thus a conviction for theft or wrongful confinement or extortion (18 W. R. 63) or for abduction (1906 P. R. 6) or for a secret attempt to poison a person (1914 P. R. 22) will not entail a forfeiture of the bond.

In 2 Mad 169, however, it is held that it is not necessary that some actually punishable offence should be committed. All that is necessary to

show is that some act was done which was likely in its consequence to provoke a breach of the the peace

A bond to keep the peace may be forfeited on any breach of the peace, whether the assault was committed against the person at whose charge the original order was framed or not—15 W R 14 It is also immaterial whether the accused committed the act with his own hands or instigated other persons to do it In either case the bond is forfeited—2 Mld 169 But the fact of the accused being the servant of one for whose benefit the breach was committed is not sufficient to forfeit the bond—11 W R 52

Breach of bond for good behaviour —A bond for good behaviour will be forfeited by the commission of any offence Thus a conviction for causing grievous hurt (1915 P R 10) or for dishonest receipt of stolen property (1910 P R 28) or a conviction under Sec 13 of the Gambling Act III of 1867 (26 A W N 13) would amount to a breach of the bond But in order to make the *surety* liable, the conviction must be for an offence similar to that for which security was given—1913 P R 15 (fully cited below)

But an actual commission of the offence is necessary for the forfeiture of the bond Where a person bound down under Sec 109 was found to be in possession of costly clothes for which he could not satisfactorily account, it was held that the bond should not be forfeited since there was no proof that actual theft had taken place—2 Weir 57 The offence may be committed anywhere If the bond is entered into in one district, and the accused is convicted of committing an assault in another district, the bond is forfeited and the Magistrate of the former district can proceed against the accused under this section—2 B L R App 11

An offence committed in a Native State would also amount to a breach of the bond—1910 P R 28 , but see *contra* 1918 P R 26

A second order for security for good behaviour during the term of a previous bond for the same is not a breach of the previous bond for good behaviour—U B R (1892—1896) 20

Effect of breach of bond —When a person forfeits a bond by being convicted of an offence, the amount of the forfeited bond may be recovered, but he cannot be forthwith imprisoned for the unexpired portion of the term for which security was taken The Magistrate's remedy is to take fresh proceedings under this Chapter—28 All 629

Liability of surety —When men stand surety in respect of section 110, it is to be understood that they undertake liability for only such good conduct on the part of the principal as is indicated by the circumstances under which the security was demanded It is unjust to hold that they are compelled to undergo liability for any conceivable form of offence committed by the person for whom they stood surety Thus

where a person was required to give security for being suspected as a thief and a habitual receiver of stolen property, and a resident of another village was accepted as his surety, and the principal offender was subsequently convicted under sec 326 I P C, it was held that the surety should always be treated in a considerate manner and he should not be held liable for sudden acts of violence committed by the principal especially when the surety was a resident of another village and had no possible opportunity of controlling the everyday life of the offender—1913 P R 15

In 1915 P R 10, under similar circumstances, the sureties were not altogether exempted but were ordered to pay a reduced penalty e.g. Rs 500 instead of Rs 1000

Accused to be allowed to enter on defence—A Magistrate is not justified in forfeiting a recognisance under this section without giving the party charged with the breach an opportunity to cross examine the witnesses upon whose evidence the rule to show cause has been issued—4 Cal 865

<p>122 <small>Power to reject sureties</small> A Magistrate may refuse to accept any surety offered under this Chapter, on the ground that, for reasons to be recorded by the Magistrate, such surety is an unfit person</p>	<p>122 <small>Power to reject sureties</small> (1) A Magistrate may refuse to accept any surety offered, or may reject any surety previously accepted by him or his predecessor under this Chapter on the ground that such surety is an unfit person for the purposes of the bond</p>
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Provided that, before so refusing to accept or rejecting any such surety, he shall either himself hold an inquiry on oath into the fitness of the surety or cause such inquiry to be held and a report to be made thereon by a Magistrate subordinate to him

(2) Such Magistrate shall before holding the inquiry give reasonable notice to the surety and to the person by whom the surety was offered and shall in making the inquiry record the substance of the evidence adduced before him

(3) If the Magistrate is satisfied after considering the evidence so adduced either before him or before a Magistrate deputed under sub section (1) and the report of such Magistrate (if any), that the surety is an unfit person for the purposes of the bond, he shall make an order refusing to accept or rejecting, as the case may be, such surety and recording his reasons for so doing

Provided that, before making an order rejecting any surety who has previously been accepted, the Magistrate shall issue his summons or warrant as he thinks fit and cause the person for whom the surety is bound to appear or to be brought before him

Change —The whole section has been newly drafted by Sec 20 of the Criminal Procedure Code Amendment Act (XVIII of 1931)

The main changes introduced by this new section are —(1) rejection of a surety previously accepted, (2) inquiry into the fitness of a surety, and (3) delegation of such inquiry to a subordinate Magistrate. The reasons have been stated below in their proper places

Magistrate —The word 'Magistrate' in this section implies the Magistrate who made the order under sec 118, or his successor in office who is properly seized of the inquiry—5 S. L. R. 87

Rejection of sureties —The question as to whether a particular person is fit to stand as surety or not, is a matter for the decision of the Magistrate. His discretion in this matter is not fettered in any way—8 C. I. J. 243, 21 C. W. N. 95. The question in every case is one of discretion and what the Court has to look to is whether under the circumstances of each particular case the order rejecting the security is a proper and reasonable order—21 C. W. N. 95. But this discretion to accept or reject a surety must be exercised only after a satisfactory inquiry in accordance with law—12 A. I. J. 1004, 47 Cal 706, 43 Cal 1074. He can refuse or accept any surety only on valid and reasonable grounds—22 W. K. 37, 10 C. W. N. 107, 11 C. W. N. 923, and on tangible evidence recorded and consid

dered by him—18 A L J 324 So long as the sureties are of a satisfactory class, and the security offered is good and sufficient, the Magistrate is not justified in rejecting them—7 N W P H C R 249 Sureties ought not to be rejected merely on the strength of reports of the Police) 15 O C 263, 18 A L J 324 20 A L J 760, 12 A L J 1004) without giving them an opportunity of meeting any allegations that may be made against them—15 Cr I J 727 (All) So also, mere conjectures and surmises are not enough to reject a surety—10 C W N 1027 Even a Magistrate cannot rely on his own personal knowledge in rejecting a surety—7 S L R 94 When a Magistrate receives private information that the sureties are bad characters, he ought not to reject them on that information alone He should bring the information to the notice of the sureties and give them an opportunity of controverting it—14 C W N 709

Before the amendment of this section it was held that when a person had been once accepted as a surety, he could not be rejected subsequently as an unfit person—1 C W N 394, 1905 P R 16 But those decisions are now rendered obsolete by reason of the addition of the words “may reject any surety previously accepted” We have adopted the suggestion that the provisions of the new section 122 should be elaborated so as to enable a Magistrate to reject a surety previously accepted by him or his predecessor —*Report of the Joint Committee* (1922) The last proviso prescribes a procedure to be followed in such a case

Test as to fitness —According to the Allahabad High Court the primary test is whether the surety can exercise proper influence over the person who has been bound over—8 A L J 785 Mere pecuniary fitness is not the only test of his fitness—10 All 206 The object of requiring security for good behaviour is not to obtain money for the Crown by the forfeiture of recognisances but to ensure that the accused should be of good behaviour It is therefore reasonable to expect that the sureties should not be men residing at such a distance as would make it unlikely that they could exercise any control over the accused—20 All 206 15 A W N 143, 18 A W N 199 15 A L J 848 But although it is reasonable to expect and require that the sureties to be tendered should not be sureties from such a distance as would make it unlikely that they could exercise any control over the men for whom they are willing to stand sureties, yet the rejection by a Magistrate of sureties on the mere ground that they live at a distance from the village of the accused, without any judicial enquiry, is not a proper order and should be set aside—15 A L J 848, 16 A L J 263

According to the Burma Chief Court the sureties must be persons who are in a position to influence the accused and likely to be able to restrain him and who can forfeit the amount of the bond if the accused fails to do so—8 Bur L T 53 In other words, both moral and pecuniary fitness is required This is also the view in Sind—1 S L R 46 In Oudh it has been held that a surety should not be rejected on the mere ground that he lived 4 miles away from the accused and that he looked like a boy and inexperienced and would consequently be too weak to take proper care of the accused—24 O C 293

According to the Bombay High Court, the condition attached to a surety bond that he should be able to control the accused is not a desirable condition—16 Bom L R 138 Therefore where the sureties offered were solvent and respectable, the mere fact that they lived at some distance from the persons bound over and were not in a position to exercise control over those persons was not a good ground for their non acceptance—44 Bom 385

In Calcutta, however, there is a conflict of decisions, as to whether the pecuniary or moral fitness is the primary test In 6 C W N 593 35 Cal 400, 13 C W N clix, it has been held that the primary test is whether the surety is a person of sufficient substance to warrant his being accepted, and the fact that he cannot supervise or control the person bound over or that he is not a resident of the same village is not material In 37 Cal 91 and 43 Cal 1024 a failure by the sureties to show that they could exercise proper control over the accused was held to be not a proper ground of their rejection In 37 Cal 446 it has been held that pecuniary test is the primary test but there may be other objections and such objection must be dealt with in each case as it arises In 3 C L J 575 however, the fact that the sureties were not men of sufficient property were not held to be a sufficient ground for unfitness And in 41 Cal 764, and 44 Cal 737 the fact that the sureties would not be able to exercise proper control over the accused who was a notorious dacoit was held to be a proper ground of unfitness of the sureties

[In the Amendment Bill of 1914 it was expressly provided that the Magistrate would be able to reject a surety on any one of the following grounds, viz (a) that he was not of good moral character, or (b) that he was not of sufficient means to enable him to fulfil his pecuniary liability under the bond, or (c) that he was unable to control the movements or actions of the person by whom the bond was executed But the Select Committee of 1916 did not accept this amendment, and observed "We think that it would be a mistake to attempt any definition of unfitness for

the purpose of acceptance of a surety, and we recommend that sec 122 should be left unaffected" The Joint Committee of 1922, however, again added those clauses, but during the debate in the Legislative Assembly they were again deleted]

The sufficiency of a surety has to be considered from a general view of his stability and the property which he holds, and in order to decide as to his stability, it is not correct to look only to his moveable properties, but his immoveable properties should also be taken into consideration—17 Cr L J 91 (Cal)

Relationship no disqualification —The fact that the sureties offered are the relations of the accused, far from being a disqualification, is a circumstance which would be an additional qualification, if the sureties are in other respects suitable—25 All 131, 10 C W N 1027, 1914 P. R 6, 16 Bom L R 138, 1 S L R 3, 22 Cr L J 22 (All)

Previous conviction not a disqualification —The proposed surety is not to be considered as unfit by reason of the fact that he was on one occasion convicted of offence,—22 Cr L J 483 (Cal), 26 All 189, 25 C W N 140, or that he was once challaned in a theft case—18 A L J. 324

Witness not disqualified —The fact that the proposed surety has given evidence in favour of the accused in the proceeding which resulted in the order for furnishing security does not disqualify him from standing as a surety for the accused—15 Cr L J 727 (All) So also the fact that the persons offered as sureties helped the accused in his defence is no ground of rejecting them—16 A L J 263

Inquiry into the fitness of sureties —Before the amendment of 1923, this section did not expressly provide for holding an inquiry into the fitness of a surety before accepting or rejecting him. But the case law on this subject (see the cases cited *supra* under heading "Rejection of sureties") shows that such an inquiry was considered as essential

Under the present section, the Magistrate can delegate the inquiry to a subordinate Magistrate. But under the old law it was consistently held in a string of decisions that the Magistrate ought himself to make the inquiry into the sufficiency or otherwise of sureties, he could not delegate the task to a subordinate Magistrate or to any other person—27 All 293; 26 All 371, 25 All 272, 1906 P R 18, 1907 P W R 7, 1914 P R 6, 18 A W N 154, 1 A L J 601, 15 O C 263, 2 S L R 11, 5 S L R 87, 12 A L J 1004, 43 Cal 1024, nor could he send the bond to a Tahsildar for report—1906 P R 18. These cases should no longer be taken as authoritative.

Where questions of fact are raised the Magistrate ought to inquire into the sufficiency of the security himself, and should not be guided by the report submitted by the Police—1 A L J 601, 27 All 293, 15 O C 263, 47 Cal 706, 3 C L J 575 10 C W N 1027

A Magistrate of one district has no jurisdiction to make an inquiry into the sufficiency of security taken under sec 109 from a vagrant by a Magistrate of another district, even if the latter authorises the former to do so, as a Magistrate of one district has no power to delegate his powers to a Magistrate of another district—1916 P W R 52

Evidence—The inquiry is to be conducted judicially, and the Magistrate has power to call for and record evidence upon oath or affirmation, any false statement will render the deponent punishable—26 All 371 This is expressly provided for in the present section

It is the duty of the Magistrate to examine the sureties as to their fitness, take such evidence as the accused may give and base his decision on the evidence so recorded. He cannot dispense with the inquiry and refuse to take evidence—7 S L R 94 If any information is derived from Police report, it is the duty of the Magistrate to take evidence as to the basis of that report and to come to a decision thereon—15 O C 263 He cannot properly base his order on an adverse opinion formed on statements which no judicial tribunal could accept as evidence—8 S L R 173

Recording reasons—The Magistrate in rejecting a surety must record his reasons for doing so in his own writing—14 C W N 709, 37 Cal 91, 44 Bom 385 When a Magistrate failed to record the reasons and in his explanation to the High Court stated that he did not remember the exact circumstances, the order rejecting the sureties was set aside—13 C W N 1111

Interference by High Court—The question whether a particular person is or is not a fit person to stand as surety is one for the decision of the Magistrate and is left to his discretion. His discretion in this matter is not fettered in any way—13 C W N 80 and the High Court will not lightly interfere—12 A L J 1004 But if the discretion has not been judicially exercised (15 CR I J 727 All), for instance, where no reasons are given why a surety was rejected (13 C W N 1111) the High Court will interfere

123 (1) If any person ordered to give security under section 106 or section 118 does not give such security on or before the date on which the period for which such security is to be given commences,

Imprisonment in default of security

he shall, except in the case next hereinafter mentioned be committed to prison, or, if he is already in prison, be detained in prison until such period expires or until within such period he gives the security to the Court or Magistrate who made the order requiring it

(2) When such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall, if such person does not give such security as aforesaid, issue a warrant directing him to be detained in prison pending the orders of the Sessions Judge or, if such Magistrate is a Presidency Magistrate, pending the orders of the High Court, and the proceedings shall be laid, as soon as conveniently may be, before such Court

(3) Such Court, after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary, may pass such order on the case as it thinks fit

Provided that the period (if any) for which any person is imprisoned for failure to give security shall not exceed three years

(3 A) If security has been required in the course of the same proceedings from two or more persons in respect of any one of whom the proceedings are referred to the Sessions Judge or the High Court under sub section (2) such reference shall also include the case of any other of such persons who has been ordered to give security and the provisions of sub-sections (2) and (3) shall in that event apply to the case of such other person also, except that the period (if any) for which he may be imprisoned shall not exceed the period for which he was ordered to give security

(3 B) A Sessions Judge may in his discretion transfer any proceedings laid before him under sub section (2) or sub-section (3 A) to an Additional Sessions Judge or Assistant Sessions Judge and upon such transfer, such Additional Sessions

Judge or Assistant Sessions Judge may exercise the powers of a Sessions Judge under this section in respect of such proceedings

(4) If the security is tendered to the officer in charge of the jail, he shall forthwith refer the matter to the Court or Magistrate who made the order, and shall await the orders of such Court or Magistrate.

Kind of Imprisonment.

(5) Imprisonment for failure to give security for keeping the peace shall be simple.

(5) Imprisonment for failure to give security for good behaviour may be rigorous or simple as the Court or Magistrate in each case directs.

(6) Imprisonment for failure to give security for good behaviour *shall, where the proceedings have been taken under Section 108 or Section 109, be simple and, where the proceedings have been taken under Section 110 be rigorous or simple as the Court or Magistrate in each case directs.*

Change —Subsections (3 A) and (3 B) and the italicised words in subsection (6) have been added by sec 21 of the Criminal Procedure Code Amendment Act (XVIII of 1923) The reasons are stated

Section mandatory—Where a Magistrate passes an order under Sec 118, no discretion is allowed to him under Sec 123, and he is bound to imprison forthwith a person who cannot give security on the date the order is made. If from any cause, the accused has not had a reasonable opportunity of furnishing sureties, the only legal method of giving him time is to postpone, for such period as may be deemed necessary, the making of the order under this section awarding imprisonment in default of security—*Punj Circ Ch* XLIV p 168

Where a person was ordered to execute a bond and find sureties on 17 12-07, and he was sentenced to imprisonment on default on 24 2-09 the order for imprisonment was held to be illegal—6 M L T 308

Person already under imprisonment—If the person against whom an order under this section is passed is already under imprisonment as a substantive punishment for some offence, the order under this section should not be passed until *after* the expiry of the term of imprisonment—Ratanlal 763, 4 Bom L R 934 A sentence under this section cannot run concurrently with any other sentence of imprisonment which the person is undergoing—16 Cr L J 272 (Mad) See section 120

If a person already imprisoned is sentenced under this section, he is simply ordered to be *detained in prison* See subsection (1) No warrant for such detention is necessary—Ratanlal 511

Subsequent imprisonment,—If the accused while undergoing an imprisonment under this section is convicted of an offence and sentenced to a term of imprisonment the sentence for the substantive offence must commence at once, and should not be postponed to take effect after the expiration of the imprisonment awarded under this section—Ratanlal 970, 1 Bur L R 364, 16 Cr L J 612 (Mad), 5 Bom L R 26 6 Bom L R 1098 The reason is that the substantive sentence is a punitive sentence whereas a sentence under this section is merely a preventive sentence, and therefore the former must be given effect to first But in 30 All 334 it was held that the sentence under this section must be carried out first

In 34 Bom 326 and 1 P L J 212 it was held however, that the two sentences must run *concurrently*

Period of imprisonment—The period of imprisonment in default of security should be the same as the period for which security was demanded under sec 118 It should be neither for a longer nor a shorter term Thus, an order requiring security for good behaviour for a period of six months, and in default, awarding rigorous imprisonment for *three* months is wrong and bad in form—Ratanlal 584, 23 All. 422 If the Magistrate thinks that the term of imprisonment should be shorter,

Judge or Assistant Sessions Judge may exercise the powers of a Sessions Judge under this section in respect of such proceedings

(4) If the security is tendered to the officer in charge of the jail, he shall forthwith refer the matter to the Court or Magistrate who made the order, and shall await the orders of such Court or Magistrate

Kind of Imprisonment

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(6) Imprisonment for failure to give security for good behaviour *shall, where the proceedings have been taken under Section 108 or Section 109 be simple and, where the proceedings have been taken under Section 110 be rigorous or simple as the Court or Magistrate in each case directs*

Change —Subsections (3 A) and (3 B) and the italicised words in subsection (6) have been added by sec 21 of the Criminal Procedure Code Amendment Act (XVIII of 1923) The reasons are stated below

Imprisonment in default of security —The imprisonment in default of furnishing security is provided as a protection to society against the perpetration of the crime, and not as a punishment for a crime committed, and being made conditional in default of finding security, it is just and reasonable that the individual should be afforded a fair chance of complying with the required conditions of security—2 Cal 384, 4 M H C R App 46 Therefore, where the Magistrate ordered the accused to give security of a description which it must necessarily be difficult to find, and directed that in default of giving the security the imprisonment would be rigorous such an exercise of discretion is unreasonable and bad—1 C I R 268

There must be *actual failure* to give security, in order to enable the Magistrate to pass an order under this Section So an order for imprisonment passed in *anticipation* of default in giving security was bad—Ratanlal 403 511, 395

Reference by Magistrate to High Court—If the Sessions Judge, on a reference made under this section refuses to confirm the order of the Magistrate passed under sec 118, and discharges the person called upon to furnish security, the Magistrate cannot refer the case to the High Court. If the Magistrate is dissatisfied with the order of the Sessions Judge his proper course is to ask the Public Prosecutor to move the High Court for revision—23 Cal 249, 28 All 91

Sub section (3)—Procedure on reference—On a reference made to him under subsection (2) the Sessions Judge should give notice to the accused—25 All 375, 27 Cal 656 and allow him to be defended by a pleader—23 Cal 493, 27 Cal 656, 4 C W N 797. Although the Code has made no provision for giving notice to the accused before disposing of references under this section, still it is the duty of the Sessions Judge to give such notice, where it was not given, the High Court severely condemned the procedure as amounting to a denial of justice—25 All 375

The Judge is bound to go into the merits of the case—35 Bom 271; it is his duty to consider the evidence and to pass an order after doing so, and not as mere matter of course—1910 P R 29. He should consider the case of each individual prisoner—37 Cal 91, and must pass his own order, and not merely confirm the order passed by the Magistrate—19 A W N 151, 6 C P L R 27. A mere confirmation of the Magistrate's order without any regular enquiry is not a sufficient compliance with the law under this section. He is bound to examine the proceedings as a Judge, that is, whether they are in due accordance with law and correct as to procedure and to form his own judgment whether upon the evidence given in the case and for the reasons given by the Magistrate the Magistrate's order was correct—L B R (1900—1902) 75. Where the order is in reference to section 110 he is bound to find a special ground on which the order is passed and it is not sufficient to find in mere general terms that it is for the interests of the community at large that the accused should be bound over to be of good behaviour—27 Cal 656

Remand—In 24 Cal 155 (which was decided when the 1882 Code was in force) it was held that the Sessions Judge was not competent to remand a case to the Magistrate to take further evidence. But now the words 'requiring from the Magistrate' (newly added in the 1898 Code) show that the Sessions Judge is competent to do so.

Term of imprisonment—Although a Sessions Judge is competent to direct under subsection (3) that the person be imprisoned for *any* term not exceeding three years, yet it is advisable that the term should always be the *same* as the period for which security was ordered to be given—23 All 422, 4 L B R 135

the proper course is to report the matter to the District Magistrate for taking action under section 124—*Ratanlal* 668 So also an order awarding imprisonment in default of security for a period longer than that for which the accused is called upon to give security is illegal—2 *Weir* 57

The period of imprisonment must be definite, an order directing the accused to be imprisoned until he gives security is bad—8 *Cal* 644

Sub section (2) —This sub section has reference only to the case where *default* is made in finding security If the security is given, the section does not apply and no reference to the Court of Session is necessary—23 *Cal* 621, 40 *All* 39 Nor is the reference to the Sessions Judge necessary for confirmation when the Magistrate passes an order for furnishing security for more than one year and no default is made—L B R (1872 92) 279

When a Magistrate passes an order for furnishing security for a period exceeding one year, and default is made, imprisonment for default cannot be awarded by the Magistrate All he is empowered to do is to detain the accused pending the order of the Sessions Judge—4 L B R 135, U B R (1897 1901) 28, 1914 P R 6 21 Cr L J 623 (Lah) If the Magistrate passes an order for imprisonment, it will be bad and it will not be cured by the District Magistrate reducing on appeal the period of security as well as the term of imprisonment to one year—2 *Weir* 57 Even a Magistrate cannot pass an order of imprisonment and then send his order for confirmation to the Sessions Judge—19 A W N 151, because the proceedings referred to the Sessions Judge are not laid before him for the purpose of confirming the order of the Magistrate they are laid before him for passing his own order—4 L B R 135, 6 C P L R 27, see also 23 A W N 28, where the order of the Magistrate was disapproved of by the High Court as being made without jurisdiction, but the High Court declined to interfere, holding that the order of the Magistrate may be taken as an order of the Sessions Judge who confirmed it

Recording evidence —A Presidency Magistrate is bound to record evidence in a case when he makes a reference to the High Court—13 C W N 318

'Exceeding one year'—Cumulative bonds —A Magistrate cannot legally amalgamate secs 107 and 110, and require the execution of two bonds for good behaviour for an aggregate period of 18 months, and in default of the same being furnished, commit to prison for 18 months' rigorous imprisonment At any rate, in such case, the provisions of sec 123 (2) should be observed—*Ratanlal* 946

Reference by Magistrate to High Court—If the Sessions Judge, on a reference made under this section refuses to confirm the order of the Magistrate passed under sec 118, and discharges the person called upon to furnish security, the Magistrate cannot refer the case to the High Court. If the Magistrate is dissatisfied with the order of the Sessions Judge his proper course is to ask the Public Prosecutor to move the High Court for revision—23 Cal 249, 28 All 91

Sob section (3)—Procedure on reference—On a reference made to him under subsection (2) the Sessions Judge should give notice to the accused—25 All 375, 27 Cal 636 and allow him to be defended by a pleader—23 Cal 493, 27 Cal 636, 4 C W N 797. Although the Code has made no provision for giving notice to the accused before disposing of references under this section, still it is the duty of the Sessions Judge to give such notice, where it was not given, the High Court severely condemned the procedure as amounting to a denial of justice—25 All 375

The Judge is bound to go into the merits of the case—35 Bom 271; it is his duty to consider the evidence and to pass an order after doing so, and not as mere matter of course—1910 P R 29. He should consider the case of each individual prisoner—37 Cal 91, and must pass his own order, and not merely confirm the order passed by the Magistrate—19 A W N 151, 6 C P L R 27. A mere confirmation of the Magistrate's order without any regular enquiry is not a sufficient compliance with the law under this section. He is bound to examine the proceedings as a Judge, that is, whether they are in due accordance with law and correct as to procedure and to form his own judgment whether upon the evidence given in the case and for the reasons given by the Magistrate the Magistrate's order was correct—L B R (1900—1902) 75. Where the order is in reference to section 110, he is bound to find a special ground on which the order is passed and it is not sufficient to find in mere general terms that it is for the interests of the community at large that the accused should be bound over to be of good behaviour—27 Cal 656

Remand—In 24 Cal 155 (which was decided when the 1882 Code was in force) it was held that the Sessions Judge was not competent to remand a case to the Magistrate to take further evidence. But now the words 'requiring from the Magistrate' (newly added in the 1898 Code) show that the Sessions Judge is competent to do so.

Term of imprisonment—Although a Sessions Judge is competent to direct under subsection (3) that the person be imprisoned for any term not exceeding three years, yet it is advisable that the term should always be the same as the period for which security was ordered to be given—23 All 422, 4 L B R 135

Sub section (3A) —“We think that where security has been demanded from two or more persons, some or one of whom may be ordered to give security for more than a year, all the parties from whom security is demanded should be dealt with by the Sessions Judge”—*Report of the Select Committee of 1916*

“The object of the new sub section (3A) is to avoid differences of opinion in a single case between the Magistrate and the Sessions Judge.....in as much as in a single case one accused person may appeal to the District Magistrate, while the case of another accused person will be referred to the Sessions Judge. The Bombay Government have suggested that where the case of one accused has to be referred to the Sessions Judge under section 123, the case of all should be referred, whether they have given security or not. We have adopted this suggestion”—*Report of the Joint Committee (1922)*

It should be noted in this connection that the provisions of section 406 (which provides for appeals against orders requiring security) have been made inapplicable to a case where the proceedings have been laid before a Sessions Judge under this sub section. See section 406, 2nd proviso, as newly enacted.

Sub section (3B) —“This sub section definitely provides for the exercise of powers under sec 123 by an Additional Sessions Judge in proceedings transferred to him”—*Statement of Objects and Reasons (1914)*

But a Joint Sessions Judge appointed to try “all cases which may be committed for trial by the Magistrate of the District” has no jurisdiction to pass orders on a reference made under section 123—*Ratanlal 830*

Sub section (6)—*Kind of imprisonment* —Before the amendment of this sub-section in 1923, imprisonment under all good behaviour cases could be simple or rigorous according to the discretion of the Magistrate. The Amendment Act of 1923, has made a slight alteration by drawing a distinction between cases under sections 108 and 109 on the one side and those under sec 110 on the other.

But although the imprisonment in default of furnishing security under sec 110 may be simple or rigorous, still it should be remembered that that section is essentially a preventive rather than a punitive provision. The imprisonment awarded in ordinary cases should therefore be simple—42 All. 563. In passing a sentence of rigorous imprisonment, the Magistrate should give reason why the imprisonment should be of the severer kind. In case of a man who has never been convicted of any offence, an order for rigorous imprisonment is unreasonable—
2 G. L. R. 268.

124 (1) Whenever the District Magistrate or a Chief Presidency Magistrate is of opinion that any person imprisoned for failing to give security under this Chapter, * * * may be released without hazard to the community or to any other person, he may order such person to be discharged

(2) Whenever any person has been imprisoned for failing to give security under this Chapter, the Chief Presidency or District Magistrate may (unless the order has been made by some Court superior to his own) make an order reducing the amount of the security or the number of sureties or the time for which security has been required

(3) Whenever the District Magistrate or a Chief Presidency Magistrate is of opinion that any person imprisoned for failing to give security under this Chapter as ordered by the Court of Session or High Court may be released without hazard to the community such Magistrate shall make an immediate report of the case for the orders of the Court of Session or High Court, as the case may be, and such Court may if it thinks fit order such person to be discharged

(3) An order under sub section (1) may direct the discharge of such person either without conditions or upon any conditions which such person accepts

Provided that any condition imposed shall cease to be operative when the period for which such person was ordered to give security has expired

(4) The Local Government may prescribe the conditions upon which a conditional discharge may be made

(5) If any condition upon which any such person has been discharged is in the opinion of the District Magistrate or Chief Presidency Magistrate by whom the order of discharge was made or of his successor, not fulfilled, he may cancel the same

(5) If any condition upon which any such person has been discharged is in the opinion of the District Magistrate or Chief Presidency Magistrate by whom the order of discharge was made or of his successor, not fulfilled, he may cancel the same

Discretion of District Magistrate—It is entirely within the discretion of the District Magistrate, who as the head of the district is responsible for the peace thereof to determine when and under what circumstances he should act under this section—13 A W N 183

125 The Chief Presidency or District Magistrate may

Power of District Magistrate to cancel any bond for keeping the peace or for good behaviour.

at any time, for sufficient reasons to be recorded in writing cancel any bond for keeping the peace or for good behaviour

executed under this Chapter by order of any Court in his district not superior to his Court

Cancellation of bond—Ground of cancellation—The Allahabad High Court has held that a bond can be cancelled on the only ground that it is no longer necessary—35 All 103, and that the District Magistrate in cancelling a bond is entitled to look only to the circumstances *subsequent* to the execution of the bond. He can cancel a bond only on the ground that something has supervened since the date of the first Court's order which satisfies the District Magistrate that in view of the facts since come to light there is no longer any necessity to keep the accused person under bond—44 All 614, he can cancel a bond for keeping the peace on the ground that there is no longer any likelihood of there being a breach of the peace—25 A W N 143. But the District Magistrate is not entitled to look to the circumstances existing at the time of the bond, thus the fitness or unfitness of the surety is a matter which can be decided in reference to the circumstances existing at the time of execution of the bond and the District Magistrate has no power to look to those circumstances and cannot therefore cancel a bond on the ground of unfitness of sureties—8 O C 245. In other words the power conferred by this section to cancel a bond is not to be exercised *as in appeal* against an order of security to keep the peace—39 All 466 44 All 614. This section cannot be used by the Magistrate as if he were sitting in appeal in such cases, and going into the evidence. If he thinks that the order is not maintainable on the evidence on record his duty is not to pass an order under section 125 but to refer the case to the High Court in its revisional side—44 All 614, 35 All 103, 41 All 651.

This was at one time the view of the Calcutta High Court also—32 Cal 918; 29 Cal 455. But that High Court has now altered its view in 34 Cal 1 (overruling 32 Cal 918) and held that the District Magistrate can cancel the bond on any sufficient ground and he is not restricted to the grounds which may have arisen subsequent to the date of execution

of the bond He can cancel the bond on the ground that it should never have been required This decision has been followed in the Punjab, Madras and C P Thus in 1908 P W. R. 12, it has been held that the District Magistrate has full discretion to consider the evidence, and can set aside the order of security on the merits, and in 37 Mad 125 and 11 N L R 98, the bond was cancelled by the District Magistrates on the ground that the evidence before the subordinate Magistrate was not sufficient to justify his passing the order for security

When can be cancelled —A bond can be cancelled 'at any time which means 'however early or however late—37 Mad 125 But an order for its cancellation cannot be passed before it has been executed—32 Cal 948

Right of applicant to be heard —When a Magistrate is moved to exercise his powers under this section to cancel a bond, the applicant or his pleader should, as a matter of general practice, be heard before the application is rejected—39 All 466

The Patna High Court holds that an application to the District Magistrate under this section cannot be treated as a petition in revision, and the District Magistrate in dealing with the application is not exercising either appellate or revisional jurisdiction As it is neither an appeal nor a revision, the petitioner has no right to be heard—19 Cr L J 246 (Pat)

Effect of cancellation —When a bond is cancelled on the ground that it is no longer necessary or that it has been wrongly taken, both the accused and the surety will be discharged from all liability—25 A W N 143 But if the bond is cancelled on the ground that the surety offered is an unfit person, the District Magistrate cannot order the accused to be imprisoned for the rest of the term, he should make an order requiring fresh security—29 Cal 457

Order under this section —The only order which a District Magistrate can pass under this section is an order *cancelling the bond* directed to be executed by a subordinate Magistrate The District Magistrate is not an appellate or revisional authority and he has no power to vacate the order of the subordinate Magistrate as ultra vires or to quash the proceedings—3 P I 103

Transfer of proceedings —Proceedings under sec 107 instituted in one district were transferred by the order of the High Court to another District and a 1st class Magistrate of the latter District ordered security to keep the peace It was held that as the order for keeping the peace was passed by a Magistrate in the latter District not superior to a District Magistrate, it was the District Magistrate of the latter

District who had jurisdiction to pass an order under this section for the cancellation of the bond for keeping the peace—23 C W N 958

Remand —A proceeding under this section is neither appellate nor revisional, consequently Sec 428 of the Code dealing with remand has no application to an order under sec 125. Where a District Magistrate finds that an order directing the furnishing of security is irregular, he should set it aside, he has no jurisdiction to remand the case to the Magistrate for taking further evidence—20 Cr L J 221 (Pat)

Reference to High Court —Where a Magistrate of the first class ordered certain persons to execute a bond to keep the peace, and the Sessions Judge to whom those persons applied for revision, being of opinion that the applicants should not have been bound over, made a reference to the High Court with a recommendation that the order should be set aside it was held that the order being passed by a Magistrate subordinate to the District Magistrate, the record should be laid under this section before the District Magistrate to deal with the matter and not before the High Court—40 All 140

The proper procedure is to move the District Magistrate, and the High Court will refuse to interfere in revision unless the District Magistrate has been moved under this section. The High Court will, on its revisional side interfere only as a Court of last resort under every exceptional circumstances—19 Cr L J 900 (Nag)

126 (1) Any surety for the peaceable conduct or good behaviour of another person may at any time apply to a Presidency Magistrate, District Magistrate, Sub divisional Magistrate or Magistrate of the first class to cancel any bond executed under this Chapter within the local limits of his jurisdiction

Discharge of sureties

(2) On such application being made, the Magistrate shall issue his summons or warrant, as he thinks fit, requiring the person, for whom such surety is bound, to appear or to be brought before him

Sub section (3) of this section has been renumbered as section 126A with certain alterations, by the Criminal Procedure Code Amendment Act (XVIII of 1923). See notes under the next section

This section deals with cases in which the surety wishes to withdraw and to have the bond cancelled, and it lays down the procedure which is to be adopted when such security becomes useless owing to the withdrawal of the surety—8 O C 245

of the bond He can cancel the bond on the ground that it should never have been required This decision has been followed in the Punjab, Madras and C. P. Thus in 1908 P. W. R, 12, it has been held that the District Magistrate has full discretion to consider the evidence, and can set aside the order of security on the merits, and in 37 Mad 125 and 11 N. L. R, 98, the bond was cancelled by the District Magistrates on the ground that the evidence before the subordinate Magistrate was not sufficient to justify his passing the order for security

When can be cancelled —A bond can be cancelled 'at any time' which means 'however early or however late'—37 Mad 125 But an order for its cancellation cannot be passed before it has been executed—32 Cal 948

Right of applicant to be heard —When a Magistrate is moved to exercise his powers under this section to cancel a bond, the applicant or his pleader should, as a matter of general practice, be heard before the application is rejected—39 All 466

The Patna High Court holds that an application to the District Magistrate under this section cannot be treated as a petition in revision, and the District Magistrate in dealing with the application is not exercising either appellate or revisional jurisdiction As it is neither an appeal nor a revision, the petitioner has no right to be heard—19 Cr. L. J 246 (Pat).

Effect of cancellation —When a bond is cancelled on the ground that it is no longer necessary or that it has been wrongly taken, both the accused and the surety will be discharged from all liability—25 A. W. N. 143 But if the bond is cancelled on the ground that the surety offered is an unfit person, the District Magistrate cannot order the accused to be imprisoned for the rest of the term, he should make an order requiring fresh security—29 Cal. 455

Order under this section —The only order which a District Magistrate can pass under this section is an order *cancelling the bond* directed to be executed by a subordinate Magistrate The District Magistrate is not an appellate or revisional authority and he has no power to vacate the order of the subordinate Magistrate as *ultra vires* or to quash the proceedings—3 P. L. R 103

Transfer of proceedings —Proceedings under sec 107 instituted in one district were transferred by the order of the High Court to another District, and a 1st class Magistrate of the latter District ordered security to keep the peace It was held that as the order for keeping the peace was passed by a Magistrate in the latter District not superior to a District Magistrate, it was the District Magistrate of the latter

CHAPTER IX.

UNLAWFUL ASSEMBLIES

127 (1) Any Magistrate or officer in charge of a police-station may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse, and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

(2) This section applies also to the police in the town of Calcutta

"Officer in charge" —An order directing the dispersal of an assembly passed by an officer (*e.g.* Deputy Commissioner of Police) superior in rank to the Police Officer is an order by a lawful authority within the meaning of this section—7 Bom 42 In all cases of an unlawful assembly, a riot or a disturbance of the peace having occurred or being apprehended, the police will take the initiative, but if they find themselves not strong enough for the occasion, immediate application is to be made to the nearest Magistrate, which under the terms of Act V of 1861, means all persons within the Police District exercising all or any of the powers of a Magistrate, and therefore includes the Tahsildars who are bound on requisition from the Police Inspector to appoint from the residents of the neighbourhood as many Police officers as the said Inspector may deem necessary. All revenue chaprasis and messengers of all kinds may legally be appointed special Police officers. Thus the whole resources of the Civil Government are at once on a special occasion brought to the assistance of the Police for the purpose of restoring public order—Punj Pol Cir Chap XXVII p 318 See Punj Cir 370

Unlawful assembly —An assembly may be for lawful purposes, *e.g.* a religious procession, but it may excite such opposition as to be likely to cause a breach of the peace. If so it may be called upon to disperse—7 Bom 42 1887 P R 22

Punishment —See Secs. 145 151 I P C

128 If, upon being so commanded, any such assembly does not disperse, or if without being so commanded, it conducts itself in such

Use of civil force to disperse

When the effect of an order discharging a surety is to remit the accused to prison for a term exceeding one year, the Magistrate is bound to refer the case to the Sessions Judge (Sec 123)—5 S L R 87

<p>126 (3) When such person appears or is brought before the Magistrate, such Magistrate shall cancel the bond, and shall order such person to give, for the unexpired portion of the term of such bond, fresh security of the same description as the original security. Every such order shall, for the purposes of Sections 121, 122, 123 and 124, be deemed to be an order made under section 106 or Section 118, as the case may be</p>	<p>126 A <i>When a person for whose appearance a warrant or summons has been issued under the proviso to sub section (3) of section 122 or under section 126, sub section (2) appears or is brought before him, the Magistrate shall cancel the bond executed by such person and shall order such person to give, for the unexpired portion of the term of such bond, fresh security of the same description as the original security. Every such order shall, for the purposes of Sections 121, 122, 123 and 124 be deemed to be an order made under Section 106 or Section 118 as the case may be</i></p>
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This was originally subsection (3) of section 126. It has been renumbered as section 126A with the italicised words added by sec 23 of the Criminal Procedure Code Amendment Act (XVIII of 1923). We think that the procedure set out in subsections (2) and (3) of section 126 should apply in the case of a surety subsequently rejected and we have added a new clause which makes the necessary amendments in section 126.—Report of the Joint Committee (1912)

necessary i.e. on the mob showing the slightest indication of retiring or dispersing. * * * After the order "cease fire" and should no further apprehension exist, the wounded would be sent to the nearest hospital, and the senior Police officer will take account of the ammunition used, and if no Magistrate is present, to draw up an accurate account of all that transpired"—C. P. Pol. Man. page 16.

129. If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Magistrate of the highest rank who is present may cause it to be dispersed by military force.

130 (1) When a Magistrate determines to disperse any such assembly by military force, he may require any commissioned or non-commissioned officer in command of any soldiers in Her Majesty's Army or of any volunteers enrolled under the Indian Volunteers Act, 1869, to disperse such assembly by military force, and to arrest and confine such persons forming part of it as the Magistrate may direct, or as it may be necessary to arrest and confine in order to disperse the assembly or to have them punished according to law.

(2) Every such officer shall obey such requisition in such manner as he thinks fit, but in so doing he shall use as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons.

131. When the public security is manifestly endangered by any such assembly, and when no Magistrate can be communicated with, any commissioned officer of Her Majesty's Army may disperse such assembly by military force, and may arrest and confine any persons forming part of it, in order to disperse such assembly or that they may be punished according to law; but if while he is acting under this section, it becomes practicable for him to communicate

Use of military force.

Duty of officer commanding troops required by magistrate to disperse assembly.

Power of commissioned military officers to disperse assembly.

a manner as to show a determination not to disperse, any Magistrate or officer in charge of a police-station, whether within or without the presidency-towns, may proceed to disperse such assembly by force, and may require the assistance of any male person, not being an officer or soldier in Her Majesty's Army or a volunteer enrolled under the Indian Volunteers Act, 1869, and acting as such, for the purpose of dispersing such assembly, and if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law.

Use of fire arms :—"Where a Magistrate or officer in charge of a Police station engaged in dispersing an unlawful assembly is compelled, in the last resort, to direct the Police to use fire arms, he shall give the rioters the fullest warning of his intention, warning them beforehand that the fire will be effective, that the ball or buckshot will be used at the first round, and that blank cartridges will not be used. Firing shall cease the instant it is not necessary. Care should be taken not to fire upon persons separated from the crowd, nor to fire over the heads of crowds, as there by innocent persons may be injured. Blank cartridges should never be served out to Police employed to suppress a riot"—Bom. Pol. Man p 70

"On being requisitioned, a squad of Police properly armed and accoutred, and carrying ten rounds of buckshot ammunition per man in command of a responsible officer will proceed with all despatch to the scene The Magistrate or superior Police officer or other subordinate officer, as circumstances may permit, supported by a file (who will duly come to the charge on being halted) will proceed to within speaking distance of the mob and command it to disperse and distinctly warn it that the fire will be effective and that blank cartridges will not be used. If the mob shows itself aggressive and determined not to disperse, the officer and file aforesaid will fall back, and the squad will on due command to that effect, load, after which another warning to the rioters to disperse will be given and if not obeyed within a reasonable time fire will be opened on distinct word of command by the officer in charge of the squad, either by specified number of files or by ranks of subsections or sections or he may order a volley according to the requirements of the situation. The fire should be so directed as to inflict as little bodily harm as possible; aim in the first instance being taken at the feet of the nearest rioters, and due care being observed to avoid firing on persons separated from the rioters. Firing must cease the moment it is no longer

CHAPTER X

PUBLIC NUISANCES

133 (1) Whenever a District Magistrate, a Sub-
Conditional order for removal of nuisance
divisional Magistrate or, when empowered by the Local Government in this behalf, a Magistrate of the first class considers, on receiving a police report or other information, and on taking such evidence (if any) as he thinks fit,

that any unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public, or from any public place, or

that any trade or occupation, or the keeping of any goods or merchandise, by reason of its being injurious to the health or physical comfort of the community, should be suppressed or removed or prohibited, or

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divisional Magistrate or * * * a Magistrate of the first class considers on receiving a police report or other information and on taking such evidence (if any) as he thinks fit,

that any unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public, or from any public place, or

that *the conduct of* any trade or occupation or the keeping of any goods or merchandise is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited *or regulated* or such goods or merchandise should be removed *or the keeping thereof regulated, or*

with a Magistrate, he shall do so, and shall thenceforward obey the instructions of the Magistrate as to whether he shall or shall not continue such action.

132. No prosecution against any person for any act purporting to be done under this Chapter shall be instituted in any Criminal Court, except with the sanction of the Local Government. Provided that no such prosecution shall be instituted in any criminal Court against any officer or soldier in His Majesty's army except with the sanction of the Governor-General in Council, and—

Protection against
prosecution for acts
done under this
Chapter.

- (a) no Magistrate or police-officer acting under this Chapter in good faith,
- (b) no officer acting under Section 131 in good faith,
- (c) no person doing any act in good faith, in compliance with a requisition under Section 128 or Section 130, and,
- (d) no inferior officer, or soldier, or volunteer doing any act in obedience to any order which he was bound to obey,

shall be deemed to have thereby committed an offence.

"The rules for calling out and employing the military in aid of the civil power were first enacted in the Code of 1872 and embody (according to Sir James Stephen) the principles laid down in the charge of Tindal C. J. to the Grand Jury of Bristol in 1832 as to the duty of soldiers in dispersing rioters. The rules in India carry the law somewhat further than it has yet been carried in England, as they expressly indemnify all persons acting in good faith in compliance with the requisitions under Ss. 128 and 130 and forbid prosecutions of Magistrates, soldiers and Police officers except with the sanction of the Governor General in Council"—Whitley Stokes' Anglo Indian Codes, Vol II, Introduction, p 11

stance, tank, well or excavation, within a time to be fixed in the order,

to remove such obstruction or nuisance, or

to suppress or remove such occupation, or

to remove such goods or merchandise, or

to prevent or stop the construction of such building, or to remove, repair or support it, or

to alter the disposal of such substance, or

to fence such tank, well or excavation, as the case may be, or

to appear before himself or some other Magistrate of the first or second class, at a time and place to be fixed by the order, and move to have the

structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order,

to remove such obstruction or nuisance, or

to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or

to remove such goods or merchandise, *or to regulate the keeping thereof in such manner as may be directed, or*

to prevent or stop the erection of, or to remove, repair or support, such building, *tent or structure, or*

to alter the disposal of such substance, or

to fence such tank, well or excavation, as the case may be, or

to destroy, confine or dispose of such dangerous animal in the manner provided in the said order,

or, if he objects so to do,

to appear before himself or some other Magistrate of the first or second class, at a time and place to be fixed by the order, and move to have the

order set aside or modified in the manner hereinafter provided

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(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court

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Explanation—A ‘public place’ includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary and recreative purposes

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Change—The entire section has been newly drafted by sec 24 of the Criminal Procedure Code Amendment Act (XVIII of 1923) But the re drafting does not introduce any important change in the section except the following—(1) Under the previous law an ordinary Magistrate of the 1st class could take proceedings under this section only when he was specially empowered by the Local Government under the present law, all Magistrates of the first class are competent to deal with the case, and no special empowering is necessary (2) the words ‘regulated and the ‘keeping of goods should be regulated have been newly added in para 3, (3) the words ‘tent or structure or any tree have been added in para 5 and (4) para 7 (relating to the disposal of dangerous animals) has been newly added Certain consequential changes have also been made in the subsequent paras of the section

Application of this Chapter—The provisions of this Chapter should be so worked as not to become themselves a nuisance to the community at large Although every person is bound to so use his property that it may not work legal damage or harm to his neighbour, yet on the other hand, no one has a right to interfere with the free and full enjoyment by such person of his property, except on clear and absolute proof that such use of it by him is producing such legal damage or harm and therefore a lawful and necessary trade such as tanning ought not to be interfered with unless it is proved to be injurious to the health or physical comfort of the community—1888 P R 17 A Magistrate's conduct in dealing with a nuisance under this chapter should be guided by considerations of justice and equity—2 B H C R 384

In all criminal proceedings initiated under this section, the Magistrate should bear in mind that he is supposed to be acting purely in the interests of the public, and should be on his guard against any tendency to use the section as a substitute for litigation in the civil Courts, in order to obtain settlement of private disputes—37 All 26, 26 Cal 869, 23 Cal 499

Nor does the fact that the parties have an alternative remedy in a Civil Court deprive the Magistrate of his jurisdiction under this section—32 C L J 42

Secs 133 and 144 —Sec 144 is more *general* and Sec 133 is more *specific*, therefore nuisances specifically provided for in this section are taken out of the general provisions of Section 144 of the Code—2 Weir 58, 10 W R 53 But where an order prohibiting a nuisance cannot be made under this section, e g an order prohibiting burial in certain places on sanitary grounds it should be made under the more general sections (143 or 144)—2 Weir 64 But if proceedings are taken under Sec 133, the procedure laid down in the present chapter must be obeyed, and the matter cannot be disposed of summarily under Sec 144 of the Code—8 W R 37

But the essential difference between the two sections is that Sec 133 expressly directs that the injunctive order should be an order *nisi*, it is an order accompanied by a condition that it is not to operate if the party shows cause, while Sec 144 speaks only of an absolute order—10 W R 53

Secs 133 and 147 —Sec 133 is not a bar to a proceeding under Sec 147 The fact that Sec 133 expressly provides for an order by the Magistrate directing the removal of an obstruction to a pathway does not necessarily imply that a similar order cannot be passed under Sec 147 of the Code—26 M L J 233. But when proceedings have been taken under section 133, no order can be passed under Sec 147—15 C W N. 667

Scope of Section —This section applies only to *public* nuisances, and does not apply to the violation of private rights—22 W R 19

Nature of proceedings —Proceedings under this section are more of the nature of civil than of criminal proceedings and the party to such proceedings is not an accused person within the meaning of Sec. 342—9 C W N 983 *Contra*—39 Mad 537, where proceedings under this chapter were held to be of a criminal nature, and not appealable

Magistrates empowered —It has already been pointed out above (under heading 'Change' *supra*) that all first class Magistrates are now authorised to take action under this section, and it is no longer neces

sary that they should be specially empowered by the Local Government

In the United Provinces, the Local Government may invest Municipal Boards with the powers of a District Magistrate to institute proceedings under this section (See Sec 57 of Act XV of 1883)

In Presidency towns, the Presidency Magistrates are not empowered to act under this chapter. In nuisance cases, they act under the Penal Code, the Police Acts, the Municipal Acts and other Local enactments, dealing with special kinds of nuisances

A Joint Magistrate in charge of the Magistrate's office cannot pass an order under this section—15 W R 66. But if he is a first class Magistrate, he can pass such order under the present law

Police report or other information —The police report or other information referred to in this section is no evidence against the opposite party—44 Cal 61

An order under this section cannot, even by consent of parties, be based upon information gathered from a *local inspection*—44 Cal 61

Unlawful obstruction —Obstruction to a public road is a nuisance though no practical inconvenience is caused—23 All 84. And it is absolutely irrelevant with what motive an obstruction upon the public highway is caused—23 All 159

A dam constructed across a public river which amounts to obstruction to the river and causes damage to the lower riparian owners may be ordered to be removed under this section—21 Cr L J 55 (Oudh)

Where a cattle market is situated in a congested part of the town, so that owing to the cattle having to be driven through narrow and congested lanes obstruction and inconvenience are caused to the public, it may be suppressed by an order under this section—22 Cr L J 582 (Cal)

The obstruction must be permanent, and not temporary—6 Bom L R 358, and it must be an *existing* obstruction. A Magistrate cannot make any order as to what should be done in case of future obstructions—21 W R 10

Where a proceeding under this section is instituted against a number of persons for various unlawful obstructions, it is essential that the order should state accurately with regard to each person the specific obstruction made by him which he is required to remove, unless it is alleged that all the persons are jointly responsible for all the obstructions mentioned—44 Cal 61

Public :—"Public place" —The provisions of this section apply to such cases where the obstruction is caused to a *public* thoroughfare—25 W. R. 4, 5 Cal. 875, 36 All 209, 22 Bom 988, 15 W. R. 67. It is

not necessary that the way should be one which is generally used by the public, it is sufficient if the way is one which is or may be lawfully used by the public—to Cr L J 210 (Cal), 12 A L J 1024 20 Cr L J 556 (Pat) But the fact that the residents of a particular village have a right to take cattle across a field is not sufficient to constitute a public right of way—26 A W N 190

An obstruction to a private path (4 Bom L R 882), or to a private drain (5 W R 58) or to a private channel (36 All 209) does not come within the purview of this section In such cases the parties must go to a civil Court

Nuisance —As to nuisance under the Penal Code, see Secs 268—294A, I P C

Keeping a gaming house is a nuisance if crowds of disorderly persons flock there and cause annoyance to the public—14 Mad 364, but if no annoyance is caused it is not a nuisance—7 B H C R 74 So also, cremation on private land is a nuisance if the cremation is performed in such a way as to be a source of injury, annoyance or danger to the neighbouring people—25 Cal 425 So also a privy kept in such a condition as to be a nuisance to passers by lawfully using a public place or way falls under this section—4 Bom L R 882 But this section does not empower a Magistrate to order a privy to be removed because it has been recently made in any locality—*Ibid*

Slaughtering cattle, though it might be offensive to the prejudice and sentiments of a community, is not a nuisance—25 W R 72

Selling fish on the road side is not a public nuisance, unless annoyance has been caused to the public—1 Bur L T 94

The act of a manager of a bonemill in permitting a large stock of bones to remain uncovered in the open air for a long time so as to become rotten and to emit a smell noxious to the people living in or passing by the vicinity, constitutes a public nuisance—34 Cal 73

A noise which is injurious to the physical comfort of the community is a nuisance—32 C L J 47

A nuisance is not legalised by long enjoyment No prescriptive right can be acquired to commit, maintain or continue a public nuisance involving actual danger to the health of the community—2 Weir 59, 16 W R 6 7 B L R 499, 4 Bom L R 882 Thus an old slaughter house can be removed if it becomes offensive to the health of the neighbourhood—7 B L R 499

But although no length of enjoyment can legalise a public nuisance, yet such fact may tend to show that the dispute was a *bona fide* dispute of title such as would have the effect of ousting the Magistrate of his jurisdiction (under section 139A) Therefore the Magistrate is bound

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But although no length of enjoyment can legalise a public nuisance, yet such fact may tend to show that the dispute was a *bona fide* dispute of title such as would have the effect of ousting the Magistrate of his jurisdiction (under section 139A). Therefore the Magistrate is bound

to see whether the fact of such long possession has not given to the objection of the person so enjoying the character of a *bona fide* dispute as to title—25 Cal 278.

'Should be removed'—These words show that the nuisance must be something which is capable of being removed. If it is not capable of being removed, (e.g. some objectionable accompaniments to a religious ceremony practised by the members of a religious sect) this section does not apply—21 A W N. 126

Offensive trade or occupation.—Para 3 deals only with trades, which are in themselves injurious to the health or physical comfort of the community, and not with those which are in themselves innocent, but in the course of which the manager or prier commits a public nuisance—1888 P R 47. Thus, keeping a house of public entertainment is not by itself an offensive trade—*Ibid*

• This section relates to an *existing* state of affairs and not to the possibility of future results. Where an occupation is perfectly innocent at present, the mere fact that it may in future become offensive to the neighbours is no ground for issuing an order under this section. Where there is no evidence that the occupation of manufacturing bricks is in itself injurious to the health or that the petitioners were so working it that the health of any one was being injured, no order under this section can be made in anticipation of the occupation being injurious to the health of the community in future—1 Lah 163

In order to bring a trade or occupation within the operation of this section, it must be shown that the interference with the public comfort was considerable and a large section of the public was affected injuriously—1911 P. W. R. 20. The working of rice husking machines throughout the whole night in a residential quarter is a public nuisance, being injurious to the comfort of the whole neighbourhood—1904 P R 9

A lawful and necessary occupation such as tanning ought not to be interfered with unless it is proved that it is injurious to the health of the community—1888 P R 17. Cultivation of maize jowars, within a short distance from the town is not an injurious occupation—1889 P R 39

A person who opens a new market close to an existing market in the village cannot be held to be carrying on a trade or occupation that is injurious to the health or physical comfort of the community, nor does the fact that the people in one market are sometimes forcibly dragged from it to the rival one, giving rise to mutual recrimination and abuse justify an order under this section—2 Weir 63, 14 M L J 207

A prostitute who behaves orderly and quietly and creates no open scandal by riotous living cannot be removed from her house on the ground of her bad character—23 W. R 68. So also, the mere existence of

houses of prostitutes by the road side or the fact that they ply their trade in their houses, cannot affect the physical comfort of the passers by—5 C W. N 566 But where they are on the public road soliciting passers by, their occupation is certainly injurious to the health of the community—1888 P R 27 In 22 All. 113, however, it was held that such an act did not amount to a public nuisance within the meaning of Sec 268 I. P C

A person who inoculates children upon an outbreak of small pox can not be said to be carrying on an offensive occupation—(1903) U B R 1st Qr 205

Under the old law, if a trade or occupation was found to be offensive, the Magistrate had to pass an order *totally prohibiting* it, under the present law, it may be ordered to be *regulated* instead of being totally suppressed

Building likely to fall —There must be proof that the state of the building is dangerous in *presenti* and not in *futuro* That the building might become dangerous by another man altering the adjoining premises in future or undermining the building in question is not a ground of action under this section—1895 P R 5

Persons living etc in the neighbourhood —This section is limited to injuries likely to be caused to passers by or "to persons living or carrying on business in the neighbourhood" These words mean not the persons who are living actually in the alleged dangerous building or in the servant's houses in the compound belonging to it, but those unascertained members of the public whose ordinary avocations may take them to the neighbourhood of the building complained of—20 All 501

Filling up excavations —An order to fill up and bring in to one level with the adjacent land, excavations made for taking mud for the manufacture of bricks, is illegal, as the Magistrate can only order them to be fenced, even if they are by the side of a public way—22 Bom 714

Fencing a tank —Where a tank is used as a reservoir for water, the Magistrate can order to have it fenced to prevent accidents, but where it is proved to be injurious to the health and comfort of the community, he may treat it as a public nuisance and cause it to be filled up—10 W. R 27, 2 W R 36

Nature of Order —An order under this section is *ex parte*—24 Cal. 395

The order should be a written one, if no written order is passed, the procedure is faulty, and a person cannot be convicted of disobeying such an order—2 Agra 1

The order should be directed to *particular* individuals and not be *general*, except in cases of emergency, to which Chapter XI applies, when they can be addressed to the public generally—8 All. 99 A person

disobeying a general order passed under this section cannot be convicted—Ratanlal 342. The disobedience of a general order passed under this section prohibiting the public in general from frequenting the roads and paths of a certain village between certain hours, is not punishable under sec 188 I P C—12 C L R 231

The order under this section must not be vague it must be such that the persons to whom it is directed will be able to learn from its contents what they are ordered to do for the purpose of complying with it—11 C L J 114. If the order is *ambiguous* and open to two interpretations the one most favourable to the accused will be adopted—16 Cal 9

The order must be *conditional*, and not absolute. Every order should state the *time* within which and the *place* where the person to whom it is issued may appear and move to have it set aside—9 Cal 637. Disobedience of an order which fixes no time or place is not an offence under sec 188 I P C—1 Bur S R 363

And lastly, the order must be confined to the removal of the *nuisance* only, and should not direct the removal of the *whole thing* for instance in the case of a tank the order should be to fence the tank and not to fill up the tank—to W R 27 2 W R 36. If the Magistrate finds a burning ghāt to be a nuisance he cannot order the removal of the ghāt but can order the removal of the nuisance *if* he can take such steps as would result in the cremation ceasing to be a nuisance—25 Cal 425. In a case where sparks from a forge might set fire to a cotton stored in an adjoining building, the Magistrate cannot order removal of the forge but should order its construction in such a way that sparks shall not issue out of it into the open air—Ratanlal 872

Taking evidence—Before passing a conditional order under this section a Magistrate is not bound to take evidence but he should do so before making the order absolute—24 Cal 395. The information which a Magistrate has recorded before passing the conditional order is not evidence against the opposite party—*Itt*, 44 Cal 61

Procedure to be strictly followed—When the Magistrate has commenced proceedings under this section he is not at liberty to proceed otherwise than in conformity with the rules laid down in this chapter—8 W R 37

Dropping of proceedings—If a Magistrate is satisfied that there are no sufficient grounds for taking action under this section he can drop proceedings—8 Cal 883. Thus where the Magistrate before making a final order comes to know that the road is not a public one, he can drop proceedings and abstain from carrying out the order for the

removal of the obstruction—15 W R 67 In such cases, the High Court will not interfere—1 C L R 486

Proceedings once dropped can be revived, if sufficient cause is shown—5 C W N 173.

Further inquiry —If a Magistrate drops proceedings under this section, neither the District Magistrate nor the Sessions Judge can order further enquiry, since sec 437 (now 436) is not applicable to it—24 Cal 395 The proper procedure in such a case is to refer the matter to the High Court—25 Cal 425

Orders not under this Section —A Magistrate has no jurisdiction under this section to pass the following orders —An order regarding the custody and guardianship of children—2 Weir 66 an order directing the construction of a new drain—20 A W N 138 an order to build a pig sty at a certain distance from the *abad*—O S C 60, an order to lop off branches of an overhanging tree—3 A W N 222, an order to close a graveyard—12 C W N 70 an order prohibiting persons to drink the water of a certain well—13 A W N 143, a general order prohibiting the public to frequent the roads and places of a certain village between certain hours—12 C L R 231 an order calling upon the inhabitants of a town to keep themselves well supplied with pots filled with water upon their roofs and also with hooked sticks for use in beating out fires—1 Bur S R 363, an order directing the owner of a house standing apart from any public road in its own compound to repair such house—20 All 501 an order directing a person to repair a well, and also to pay a fine out of which the well has to be repaired—Ratanlal 50, an order directing a person to use his own property so as not to cause injury to the property of another—Ratanlal 516 an order directing a person not to cultivate his land—1 A L J 615

Civil Suits —No suit will lie in a Civil Court to *set aside* an order passed under this section, and the Civil Courts have no jurisdiction to question or set aside such order—17 W R (F B) 18 (overruling 7 W R 95), 11 W R 434 (civil) 4 B L R 24 Thus a Civil Court has no jurisdiction to order a road, which has been declared by the Magistrate as a public road, to be closed—11 W R 434 (civil) But a suit will lie for a *declaration* under sec 42 of the Specific Relief Act against any one of the public who claims to use the road as a public road—15 Cal 460 8 B H C R A C 94 19 W R 426 (civil), 6 Cal 291, 6 Bom 670

Since a Magistrate's order under this section is not a conclusive determination of the question of *title*, it is competent to a Civil Court to try the question whether a land is private property or a public place—6 Cal 291

The suit will lie, as regards a public road, not against the Magistrate but against the Secretary of State—6 Bom 670, but of course it is open to the party to bring a declaratory suit against any member of the public who may use the road as a public one, and in such cases, it is unnecessary to make the Secretary of State a party—15 Cal 460

Revision —The High Court can interfere when the Magistrate acted without jurisdiction or in excess of his jurisdiction or when there was an error in law. Where the Magistrate came to a finding after considering all the evidence before him, the High Court cannot interfere on the ground that the finding was erroneous—9 B L R 417. But the High Court can interfere when there is no evidence or no reasonable evidence on record to justify the Magistrate's finding—7 B L R 516

Further, it is not the practice of the High Court to entertain an application in revision against an order made by a Magistrate in a proceeding under this section, unless the party aggrieved had first moved the Sessions Judge under Secs 435 and 438 of the Code—48 Cal 534

Review —A proceeding under this section being a judicial proceeding is open to review by the High Court—9 B H C R A C 160 7 B L R 449

Appeal —Orders passed under this Chapter are criminal orders and no Letters Patent Appeal lies therefrom—39 Mad 537

134 (1) The order shall, if practicable, be served on the

Service or notification of order person against whom it is made, in manner herein provided for service of a summons

(2) If such order cannot be so served, it shall be notified by proclamation, published in such manner as the Local Government may by rule direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person

Non service —The terms of this section are directory and ought to be followed but an omission to follow its provisions is a mere irregularity and does not nullify the order—16 Cal 9. Thus, the non service of notice does not invalidate the order if the parties admit that they knew of the existence of the notice—5 W R 4. Where the parties had information of the order, it is immaterial that the mode in which it was brought to their notice was not in strict accordance with this section—1900 P. R 2

Proclamation —In Bengal, the proclamation is to be made by beat of drum—Calcutta Gazette, 1883 Part III, p 245. In Bombay, it is to be made by beat of drum, and by publication in the Bombay Gazette

and such local newspapers as the Magistrate directs—Bombay Gazette, 1901, Part I, p 779

135. The person against whom such order is made shall—

Person to whom order is addressed to obey or show cause or claim jury.

(a) perform, within the time *and in the manner* specified in the order, the act

directed thereby ; or

(b) appear in accordance with such order and either show cause against the same, or apply to the Magistrate by whom it was made, to appoint a jury to try whether the same is reasonable and proper.

Change —The italicised words have been added by sec. 25 of the Criminal Procedure Code Amendment Act (XVIII of 1923).

Application to show cause and for a jury —Since the proceeding under Sec. 133 is in the first instance entirely *ex parte*, it is consequently desirable that reasonable opportunity should be given to the opposite party to show cause as contemplated by this section and to adduce evidence as prescribed by section 137—20 C. W. N. 1171.

Under this section a party cannot *both show cause and apply for a jury* at the same time ; he has the right to adopt only one of the alternatives—13 C. W. N. 367.

Bona fide claim —The question as to whether the claim set up by the defendant is a bona fide one is to be decided by the Magistrate himself and not to be left to the jury—26 Cal 869 A case can be referred to the jury only after the Magistrate has decided that the claim set up by the petitioner is not a *bona fide* claim, and that the way alleged to be obstructed is one which is or may be lawfully used by the public. The jury is not competent to decide the question whether there is a public right of way. What the jury has to consider is whether the order passed by the Magistrate under sec 133 is a reasonable and proper order—3 C. W. N. 845, 10 C. W. N. 845, 31 Cal 979, 9 C. W. N. 72, 18 C. W. N. 1148 Therefore a Magistrate is not competent to make a reference to the jury without first determining whether the way is a public thoroughfare or not, or without determining whether the claim set up by the opposite party is *bona fide* or not—10 C. W. N. 845 ; 31 Cal. 979, 26 Cal. 869, 2 P. L. J. 67. If however the Magistrate through a mistaken view of the law, makes a reference to the jury, without finding whether the way is a public way or not, the jury would be met by a bona fide objection that the way is private property, which would render them powerless to proceed ; the Magistrate will then have

to take up the matter himself, and if the claim is bona fide, will have to refer the parties to a Civil Court—5 Cal 875

When a person has applied for a jury and jury has been appointed the party cannot set up the plea that he caused the obstruction under a bona fide claim of right—22 All 267 30 All 364 The application for jury will operate as a waiver of the plea of *bona fide* claim. Once a jury is appointed on the application of the person against whom an order has been made under sec 133 it is not open to him at a later stage to set up a claim of right to the subject of contention and to have his claim determined by the Magistrate before the jury proceed with the matter—7 Bur L T 23

136 If such person does not perform such act or
 Consequence of his failing to do so appear and show cause or apply for the appointment of a jury as required by Section 135 he shall be liable to the penalty prescribed in that behalf in Section 188 of the Indian Penal Code, and the order shall be made absolute

Object of section—The provisions of this section are stringent, because the intention is to create facilities for conditional orders, which Magistrates are authorised to pass under this chapter, becoming final without needless delay and thereby promptly to ensure public safety—12 Mad 475 Therefore an order under this section must be passed without delay. Where a conditional order passed under section 133 was made absolute 4 years later the High Court treated the final order as resting on no conditional order and reversed it—73 Bom L R 844

Order absolute—This section conclusively presumes that the conditional order under Sec 133 was correctly made—17 Mad 475 Where an order has become absolute under this section it cannot be questioned in any subsequent proceeding—1900 I L R 2 It is not competent to the party to go behind the order and question its validity in any way—13 All 575 But where the Magistrate makes an order which he had no jurisdiction to pass the party affected by it can go behind the order—20 All 501.

Even though an order has been made absolute under this section upon the party not being able to attend on the date fixed the Magistrate can set aside the ex parte order on the appearance of the party. In such a case the Magistrate must proceed in record evidence as provided by Sec 137 and shall then either make the order absolute again or shall drop the proceedings as the case may be—19 Cr L J 214 (1st)

No further notice necessary —Whenever the time fixed in the order under sec 133 has been allowed to pass without compliance with the order or without protest, the liability to punishment attaches at once, and no further notice is necessary under Sec 140—31 Mad. 280.

137. (1) If he appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons case.

Procedure where he appears to show cause

(2) If the Magistrate is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case.

(3) If the Magistrate is not so satisfied, the order shall be made absolute

'Magistrate' —The power to issue a conditional order belongs only to the Magistrate mentioned in the beginning of Sec. 133. The power to appoint a jury also belongs to the Magistrate who made the conditional order (see sec 135) But the Magistrate who is to hold the inquiry under this section need not be the Magistrate who made the order under sec. 133, the Magistrate in this section is the Magistrate *before whom the party is ordered to appear* (see sec. 133) . it may be either the Magistrate himself who issued the conditional order, or a Magistrate of the first or second class mentioned in the last para of section 133 (1) This seems to be the meaning of sections 133 and 137 read together. Therefore where a Magistrate issuing a conditional order under sec. 133 required certain persons to appear before a 2nd class Magistrate, the latter exercising his powers under this section, can take evidence, confirm the conditional order or stay further proceedings See 9 Mad 201 , 25 Cal 278 , 2 Weir 61.

Taking evidence —When a party appears to show cause, the Magistrate is bound to take evidence—26 W R. 7 , 1 Bom. L R. 783 , Ratanlal 320 ; 8 C L R 831 , 11 Bom 375 Even if the party appears after the time fixed in the order, but before the case is taken up, the Magistrate is bound to hear his objection and take evidence for the order he has to make—10 W R 27 The absence of the objector at an adjourned hearing after he has once appeared to show cause will not absolve the Magistrate of his duty of taking some evidence at least before making the order absolute—2 Bom L R 818 The Magistrate cannot act solely on his own opinion ; he is bound to take evidence as the basis of his order which he is to make—11 Bom 375 ; 2 Weir 62 It is illegal for him to make the order absolute solely on the report of

to take up the matter himself, and if the claim is bona fide, will have to refer the parties to a Civil Court—5 Cal 875

When a person has applied for a jury and jury has been appointed the party cannot set up the plea that he caused the obstruction under a bona fide claim of right—22 All 267 30 All 364 The application for jury will operate as a waiver of the plea of *bona fide* claim. Once a jury is appointed on the application of the person against whom an order has been made under sec 133 it is not open to him at a later stage to set up a claim of right to the subject of contention and to have his claim determined by the Magistrate before the jury proceed with the matter—7 Bur L T 23

136 If such person does not perform such act or
 Consequence of his failing to do so appear and show cause or apply for the appointment of a jury as required by Section 135 he shall be liable to the penalty prescribed in that behalf in Section 188 of the Indian Penal Code and the order shall be made absolute

Object of section—The provisions of this section are stringent because the intention is to create facilities for conditional orders which Magistrates are authorised to pass under this chapter becoming final without needless delay and thereby promptly to ensure public safety—12 Mad 475 Therefore an order under this section must be passed without delay. Where a conditional order passed under section 133 was made absolute 4 years later the High Court treated the final order as resting on no conditional order and reversed it—13 Bom L R 843

Order absolute—This section conclusively presumes that the conditional order under Sec 133 was correctly made—12 Mad 475 Where an order has become absolute under this section it cannot be questioned in any subsequent proceeding—1020 P R 2 It is not competent to the party to go behind the order and question its validity in any way—13 All 575 But where the Magistrate makes an order which he has no jurisdiction to pass the party affected by it can go behind the order—20 All 501

Even though an order has been made absolute under this section upon the party not being able to attend on the date fixed the Magistrate can set aside the *ex parte* order on the appearance of the party. In such a case the Magistrate must proceed in record evidence as provided by Sec 137 and shall then either make the order absolute again or shall drop the proceedings as the case may be—19 Cr L J 214 (1st)

is improper, such jurors shall be counted together as unaoimously objecting to the order—25 W R 31

The only thing which the jury is to consider is whether the conditional order passed by the Magistrate under Sec 133 is reasonable and proper. They cannot enter into the question of rights of parties—5 Cal 875, 31 Cal 919 10 C W N 845 3 C W N 345 They cannot decide the question of bona fides of the claim set up by the opposite party—See notes under Secs 137, 139A

Verdict of majority —The 'majority' means a majority of the persons appointed, and not majority of the persons attending—13 Cal 275 Therefore, where one juror out of five was all along absent, the Magistrate cannot accept the verdict of the majority of the four who attended—11 Cr L J 402 (Cal) So also, a decision by three out of five, in the absence of the other two, is invalid—23 All 159 So again, a verdict is defective when four out of five jurors were present at the time of the local investigation and one was absent Such a verdict is illegal and cannot be acted upon, and a fresh jury should be appointed—24 C. W N 928

The finding of the jury should be arrived at after each juror exercises his own discretion in the matter A verdict given by jurors, some of whom blindly follow the opinion of others is not proper Where out of five jurors, only two saw the place, and the third never visited it, but passed his opinion solely on what had been told him by the other two, it was held that the opinion of the so called majority was not that of a legal majority—25 W R 4

Objection to verdict —The party objecting to the verdict must show prima facie that either the jury did not apply a judicial discretion to the case, or that they could not have arrived at that verdict by a proper exercise of their discretion on the materials before them—23 W R 15

Magistrate bound by verdict —A Magistrate is not at liberty to take only a part of the verdict he is bound to be guided by their whole decision If any part of their verdict is ambiguous, he can ask them to express their opinion clearly—12 W R 28 The Magistrate's order must be based upon the verdict given by the jury for his guidance—22 W R 86

If the verdict modifies the Magistrate's order, he may or may not accept the modification If he accepts the modification, he is bound to be guided by their decision If he does not accept the modification he must stop further proceedings—12 W R 28

Remitting the case to another Magistrate —On receipt of the verdict of the jury, the Magistrate is not competent to remit the case for disposal to a second class Magistrate The 1st class Magistrate is alone

because he has no such power, and the jury is not legally constituted—10 C L R. 193

A jury consisting of less than five persons is not a properly constituted jury, and an order based on the verdict of such a jury is invalid—22 Cr L J 511. (Cal)

Procedure —This chapter does not lay down any rules as to the procedure which a jury appointed under this section should adopt in enquiring into a matter submitted to them—30 All 364

The jury is bound to hear the parties and their witnesses. They cannot decide a matter referred to them merely on local inspection without taking evidence—26 Cal. 869, 6 C. W. N 886

Summons to jury —The summons should specify the time and place when and where the jurors should attend—5 All 7

Verdict after time fixed —Where a jury appointed under this section had considered the matter referred to them, and the individual members of the jury had given in their opinion to the foreman, but he sent in his report after the time fixed, but before a final order was made by the Magistrate, it was held that the Magistrate should have acted on the verdict of the jury, and not appointed a second jury—21 W R 54

Extension of time —The power conferred by subsection (2) for the extension of time for delivery of verdict can be exercised by the Magistrate only and cannot be delegated to the foreman of the jury—23 All 159

Reference to arbitration —As the dispute under this chapter is of a public nature, in which public interests are involved, the case cannot be referred to arbitrators by agreement of parties—2 P. L. T 6, 22 Cr L J 511 (Cal)

139 (1) If the jury or a majority of the jurors find that the order of the Magistrate is reasonable and proper as originally made, or subject to a modification which the Magistrate accepts, the Magistrate shall make the order absolute, subject to such modification (if any).

Procedure where jury finds Magistrate's order to be reasonable.

(2) In other cases no further proceedings shall be taken under this Chapter.

Verdict of the jury —The jurors are not to give their individual and separate opinions to the Magistrate, but they are to consult together and then express their collective opinion through their foreman—15 All 158.

The findings of all the jurors need not agree in every detail, but if all the members agree that the order of the Magistrate taken as a whole

"The principal question in connection with this clause is whether, as provided in the Bill, questions of title in relation to rights of way and the like should, for the purposes of the Chapter, be finally decided by the Magistrate, or whether the almost uniform decisions of the High Courts, which lay down that the Magistrate must stay proceedings if he is satisfied that the question has been raised *bonâ fide*, should be followed. We prefer to accept the latter view as laid down in *Mamurdey v Bidhu Bhusan Sircar*, 1 L R. 42 Cal, 158, and we have provided for it as a special case in a new section 139 A"—*Report of the Joint Committee (1921)*

Bona fide claim—If a bona fide dispute as to the existence of a public right is set up, the powers under sections 133-137 as regards obstruction to public ways, cannot be exercised by the Magistrate—4 Bom L R 637, 15 Bom L R 57, 22 Bom 988, 28 All 98, 11 Cal 8, 1 C L J 434, 2 We r 61. But the claim in order to have this effect must be *bona fide* and not a mere pretence to oust jurisdiction. The mere assertion of a claim made without reasonable ground or honest belief in it or honest intention to support it will not oust a criminal Court of its jurisdiction under these sections—15 Cal 564, 25 Cal 278, 22 Cr L J 459 (Cal), 22 Cr L J 577 (Cal). So also a claim set up only to annoy an enemy of the claimant, cannot be said to be a bona fide claim—1 C L J 434.

Therefore, when a person against whom an order is made under section 133 to remove an obstruction from a public way, claims it as a private way, the Magistrate should first determine whether the claim is bona fide or not—26 Cal 869, 31 Cal 979, 3 C. W. N 345, 7 C W N 117, 10 C. W N. 845, 2 P. L J. 67, 22 Cr L J 351 (Cal). The question of bona fides of a claim is a question of fact, and has to be enquired into like any other question of fact—20 Cr L J 556 (Pat), and the Magistrate must take the evidence adduced by each side—23 C. W N 774. If however, the encroachment complained of is on a way which is admittedly public, it is not necessary, in order to give jurisdiction, that there should be a finding as to the bona fide character of any claim that might be made by the accused—6 C W N 886.

[In this connection a very nice question arises as to which question the Magistrate should decide first—whether he is first to determine whether the way encroached upon is a public way or not, or whether the question of bona fides is to be primarily considered. In 2 C W N 554, it was held that the former question is to be first determined by the Magistrate, so also seems to be the view in 6 C W N 886. But in 7 C W N. 717, 31 Cal 979, 10 C W. N 845, 1 Bur L R. 530, 25 C. L J. 349 31 C L J 172 and 2 P L J 67 it was held that the ques

competent to deal with the case further and must dispose of the case himself—43 Mad 316

Reference to High Court —The decision of the jury appointed under Sec 138 is not a proceeding in a Criminal Court which the District Magistrate can call for and examine and refer to the High Court under Sec 435—Ratanlal 336

139A (1) *Where an order is made under Section 137 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and, if he does so, the Magistrate shall before proceeding under Section 137 or Section 138, inquire into the matter*

Procedure where existence of public right is denied

(2) *If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Civil Court and, if he finds that there is no such evidence, he shall proceed as laid down in Section 137 or Section 138, as the case may require*

(3) *A person who has, on being questioned by the Magistrate under sub section (1) failed to deny the existence of a public right of the nature therein referred to, or who having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial, nor shall any question in respect of the existence of any such public right be inquired into by any jury appointed under Section 138*

This section has been newly added by sec 21 of the Criminal Procedure Code Amendment Act (VIII of 1923)

The procedure which ought to be followed by the Magistrate in case a *bona fide* claim of right is set up by the petitioner, was not laid down in any section of this chapter under the previous law. But quite a large number of caselaws has gathered round this point, which the Legislature has now thought fit to crystallize into a new section

[illegible]

Sub-section (3) — Question shall not be referred into the jury. The question as to whether the same is a question of law or fact is to be decided by the Magistrate himself and not to be left to the jury—5 Cal 50; 10 C W N 841. The jury is not competent to decide the question whether there is a public right of way. 11 W. N 345, 31 Cal 679. Contra—30 All 114 where it has been held that it is within the competence of the jury to decide as to the validity of an objection that the way alleged to have been obstructed is not a public way. But the Allahabad ruling has been disapproved of by the Legislature and is rendered obsolete by this section. We think that the only question to be left to the jury should be whether the measures directed by the Magistrate to be taken are reasonable and proper and in view of the decision in 30 All 161 we think it desirable that this should be made clear.—*Report of the Select Committee of 1910*

140 (r) When an order has been made absolute under

**Procedure on order
being made absolute**

Section 136, Section 137 or Section 139, the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that in case of disobedience he will be liable to the penalty provided by Section 188 of the Indian Penal Code.

(2) If such act is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building, goods or other property removed by his order, or by the distress and sale of any other movable property of such person within or without the local limits of such Magistrate's jurisdiction. If such other property is within such limits, the order shall extend to its attachment and sale with a provision by the Magistrate with respect to what is to be done with the proceeds of the sale in the event of its being insufficient to satisfy the claim.

tion of *bona fides* is to be determined first and without coming to an express finding to this effect, the Magistrate has no jurisdiction to proceed to determine whether there is or is not a public way.]

The question of *bona fides* is a question to be decided by the Magistrate, and not to be left to the jury—26 Cal 869, 2 P L J 67

Claim when to be set up —A bona fide claim should be set up at or before the hearing, but not afterwards, and the Magistrate who finds the claim not to be *bona fide* should state the reasons for his decision which is subject to revision by the High Court—15 Cal. 564, 23 Cal. 499, 1 C L J 434, 7 C W N 117

Dispute between Government and private individual —In case of dispute between the Government and a private individual as to the right to the ground on which an encroachment is alleged to have been made by the latter by building a wall, a Magistrate should not proceed under this section, until the dispute is settled—Ratanlal 378 2 Bom. L. R 818

"Inquire into the matter" —"Our proposals involve the necessity of laying down clearly that the Magistrate only is competent to *inquire* into a claim relating to title'—*Report of the Joint Committee* (1922) The Magistrate cannot *decide* the question of title—see infra In the Bill of 1921 it was proposed to lay down that the Magistrate would decide the question of the existence of the public right, and that his decision would be final. But the Joint Committee did not accept this view

Sub section (2) —

If the Magistrate finds that the claim is *bona fide*, he should abstain from further action and should allow the party to substantiate his claim in a Civil Court—15 Cal 564 17 Cal 562 3 C W N 345, 8 C W N 143, 42 Cal 158, 25 Cal 278, 22 Cr L J 351 (Cal) 20 A W N 204, 28 All 98, 1903 P R 2, 10 Bom L R 563 L B R (1872 92) 530, 4 C P. L R 142 He cannot proceed any further in the matter he cannot decide whether the title exists or not—28 All 98 he is not competent to decide whether the title is barred by limitation or not—35 Cal 283, he cannot decide whether the way is public or not—1 Bur L R 530; he cannot even order the party setting up the claim to institute the suit *within a specified time*—2 C W N 554 23 C W N 774, 24 C W. N. 247.

If the Magistrate finds that the claim is made *bona fide*, he should allow the defendant a reasonable time within which to establish his rights in a Civil Court; and in the meantime *proceedings may be stayed* If the defendant does not assert his right in a Civil Court within a reasonable time, he should proceed with the case—8 C W. N 143, 47 Cal. 692 (F. B.), 22 Cr L J 351 (Cal)

If upon inquiry the Magistrate finds that the channel in question is a public channel, the Magistrate is not bound to inquire whether the accused had a *bona fide* claim of right to the channel, or to refer the matter to the Civil Court—28 C. L. J. 211.

Sub-section (3) :—Question shall not be inquired into by jury :—The question as to whether the claim set up by the defendant is a *bona fide* one is to be decided by the Magistrate himself and not to be left to the jury—26 Cal. 869 ; 10 C. W. N. 845. The jury is not competent to decide the question whether there is a public right of way—3 C. W. N. 345 ; 31 Cal. 979. Contra—30 All. 364, where it has been held that it is within the competence of the jury to decide as to the validity of an objection that the way alleged to have been obstructed is not a public way. But the Allahabad ruling has been disapproved of by the Legislature and is rendered obsolete by this section. "We think that the only question to be left to the jury should be whether the measures directed by the Magistrate to be taken are reasonable and proper ; and in view of the decision in 30 All. 364 we think it desirable that this should be made clear"—*Report of the Select Committee of 1916*.

140. (1) When an order has been made absolute under Section 136, Section 137 or Section 139, the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that in case of disobedience he will be liable to the penalty provided by Section 188 of the Indian Penal Code.

(2) If such act is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building, goods or other property removed by his order, or by the distress and sale of any other moveable property of such person within or without the local limits of such Magistrate's jurisdiction. If such other property is without such limits, the order shall authorize its attachment and sale when endorsed by the Magistrate within the local limits of whose jurisdiction the property to be attached is found.

(3) No suit shall lie in respect of anything done in good faith under this section.

A person who neither complies with the order passed under Sec. 133, nor protests against it within the time fixed, can be prosecuted under Sec. 136 without further notice being given under this section—31 Mad. 280 (cited under Art. 136) ; 13 All. 577.

If a final order is passed by a Magistrate under this chapter, any succeeding Magistrate cannot go behind the order and question its legality. Therefore, if an application is made under this section to the succeeding Magistrate for the enforcement of an order passed by a preceding Magistrate, the former cannot reject the application on the ground that the order passed by his predecessor was an illegal order—27 C. W. N. 459

141. If the applicant, by neglect or otherwise, prevents the appointment of the jury, or if from any cause the jury appointed do not return their verdict within the time fixed or within such further time as the Magistrate may in his discretion allow, the Magistrate may pass such order as he thinks fit, and such order shall be executed in the manner provided by Section 140

Procedure on failure to appoint jury or omission to return verdict.

Jury failing to return verdict —When the majority of the jurors perversely refuse to return a verdict for fear of displeasing either party, the Magistrate can discharge them and appoint a new jury—44 All. 575. Where upon failure of the jury to return their verdict, the petitioner appeared before the Magistrate and prayed for appointment of a fresh jury, it was held that the Magistrate ought to have appointed a new jury and not made the original order absolute—12 C. W. N. 1047. Under this section, the Magistrate upon failure of the jury to return a verdict has a discretion to pass such order as he thinks fit. Therefore, where the foreman of the jury simply returned the papers without a verdict, the Magistrate had jurisdiction to make the order absolute—4 P. L. T. 15. But it is desirable that under such circumstances the Magistrate should inquire into the case and should give the party an opportunity of showing cause and producing evidence, before he makes the order absolute under this section—4 P. L. T. 15 ; 4 P. L. T. 13. But, if upon the failure of jury to return verdict, the petitioners did not take any action to move the Magistrate for taking evidence on their behalf, the Magistrate was justified in making the order absolute—13 C. W. N. 767.

Fine —An order sentencing a man to a fine for the nuisance, and an additional fine for each day he continues it after the conviction is illegal —1 B L R. O C. 41.

142 (1) If a Magistrate making an order under Section 133 considers, that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may, whether a jury is to be, or has been, appointed or not, issue such an injunction to the person against whom the order was made, as is required to obviate or prevent such danger or injury pending the determination of the matter

(2) In default of such person forthwith obeying such injunction, the Magistrate may himself use, or cause to be used, such measures as he thinks fit to obviate such danger or to prevent such injury.

(3) No suit shall lie in respect of anything done in good faith by a Magistrate under this section

Imminent danger —An injunction under this section can be issued only when there is imminent danger or fear of injury of a serious kind to the public—21 W. R. 86 Where a Magistrate who makes an order under this section, subsequently directs further inquiry to be made, the Magistrate must be held to have abandoned the proceedings under this section, and he should have proceeded under Secs 136 and 137 instead of fining the party under sec 188 I P C —*Ibid*

No injunction can be issued under this section when the danger has passed away—1 W R 8

143. A District Magistrate or Sub-divisional Magistrate, or any other Magistrate empowered by the Local Government or the District Magistrate in this behalf, may order any person not to repeat or continue a public nuisance, as defined in the Indian Penal Code or any special or local law.

Magistrate may prohibit repetition or continuance of public nuisance.

Secs 143 and 144 —This section enables the Magistrate to prevent the *continuing* of public nuisance, whereas Sec 144 enables him to prevent it *for the first time*—19 Mad 464

Scope of section:—A person will be bound by an order under this section only when the order is issued to him *personally* and not by a proclamation addressed *generally* to the public at large—8 All 99; 2 W. R. 32.

Revision, —It was formerly held that orders under secs. 143 and 144 were not open to revision because they were not 'proceedings' within the meaning of sec 435—12 A. W. N. 102 But now by reason of the omission of subsection (3) of sec 435 by the Amendment Act of 1913, orders under section 143 will henceforth be liable to revision.

CHAPTER XI.

TEMPORARY ORDERS IN URGENT CASES OF NUISANCE OR APPREHENDED DANGER

144 (1) In cases where, in the opinion of a District Magistrate, a Chief Presidency Magistrate, Sub-Divisional Magistrate, or of any other Magistrate *not being a Magistrate of the third class* specially empowered by the Local Government or the Chief Presidency Magistrate or the District Magistrate to act under this section, *there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable,*

such Magistrate may, by a written order stating the material facts of the case and served in manner provided by Section 134, direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray.

Power to issue order absolute at once in urgent cases of nuisance or apprehended danger.

(2) An order under this section may in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed *ex parte*.

(3) An order under this section may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place.

(4) Any Magistrate may *either on his own motion or on the application of any person aggrieved* rescind or alter any order made under this section by himself or any Magistrate subordinate to him, or by his predecessor in office.

(5) *Where such an application is received, the Magistrate shall afford the applicant an early opportunity of appearing before him either in person or by pleader and shewing cause against the order, and, if the Magistrate rejects the application wholly or in part, he shall record in writing his reasons for so doing.*

(6) No order under this section shall remain in force for more than two months from the making thereof; unless, in cases of danger to human life, health or safety or a likelihood of a riot or an affray, the Local Government by notification in the official Gazette, otherwise directs.

Change —The italicised words in subsection (1) and (4) have been added, subsection (5) has been newly enacted and the old subsection (5) has been renumbered as subsection (6), by section 27 of the Criminal Procedure Code Amendment Act (XVIII of 1923). The reasons have been stated below in their proper places.

Application of this section —The power conferred by this section upon a Magistrate is an extraordinary power and the Magistrate should resort to it only when he is satisfied that other powers with which he is entrusted are insufficient. The authority of the Magistrate should be exercised in defence of rights rather than in their suppression, in repression of illegal, rather than in interference with lawful, acts—6 Mad. 203. It is the duty of the Magistrate to support all lawful acts as far as possible—1917 M. W. N. 724. Before making the order the Magistrate should hold an inquiry and determine which party has the legal right, and protect the party whom he finds entitled to the exercise of his right—Ratanlal 967, 5 Cal. 132. If however, a Magistrate apprehends a

breach of the peace, he can restrain temporarily the exercise by any private person of his lawful rights to prevent that result—5 C W. N. 329

Magistrates empowered.—Since the power to be exercised under this section is an extraordinary power, the law is careful to confer this power upon those Magistrates alone whose discretion is prominently guaranteed by their responsible position or by selection—6 Mad 203.

In Punjab, all Magistrates of 1st and 2nd class have been empowered to act under this section—Punjab Gazette, 1883 Part I p 52 So also in Upper Burma In Bombay, Assistant Superintendents of Police have been empowered to act under section 144 See Bombay Gazette, 1883, Part I, page 396

By the Amendment Act of 1923, third class Magistrates have been expressly prohibited from being empowered under this section "We do not think that powers under section 144 should be granted to a Magistrate of the third class, and we have provided for this by a small amendment"—*Report of the Select Committee of 1916*

Conditions precedent —Proceedings under this section may be taken only in *urgent* cases of nuisance or apprehended danger, the existence of these circumstances is a condition precedent to an action under this section—1 C L R 58 And before taking action under this section the Magistrate should be of opinion that immediate prevention or speedy remedy is necessary, and he should state in the order the materials upon which his opinion is based—32 Cal 935 Jurisdiction under this section depends on the urgency of the case, and the mere statement of the Magistrate that he considered the danger to be imminent is not sufficient to give him jurisdiction if the facts set out by him show that really there was no urgent necessity for taking action—23 C W N 145

'If there is sufficient ground for proceeding' —These words did not occur in the Bills of 1914 or 1921, nor in the Report of the Joint Committee, but have been added during the Debate in the Legislative Assembly, a short summary of which is given below —

Bhai Mansing (a member of the Assembly) moved an amendment requiring the Magistrate to act on *reliable information* under this section and not merely on his opinion

Sir Henry Moncrieff Smith said that Sec 144 was important inasmuch as it dealt with the power deliberately placed in the hands of the executive for maintenance of public tranquility. The amendment of Mr Mansingh, he considered defective but in order to meet the wishes of the House he moved another amendment on behalf of Government adding the words '*if there is sufficient ground for proceeding under it is to be*'

This amendment met with the unanimous approval of the House and was adopted in the place of Bhai Mansingh's (See the Debates of the Legislative Assembly, dated January 25, 1923)

[In this connection, another proposed amendment is worth mentioning. Mr. Rangachariar moved the addition of a sentence that the Magistrate should resort to section 144 only "after recording his opinion that the other powers with which he is entrusted are insufficient".

Sir Malcolm Hailey (Home Member) opposed the proposition which he said would not improve position. Government had already a few minutes ago carried an amendment which provided that action should be taken only on the existence of sufficient grounds.

Mr. Rangachariar's amendment was put to the House and rejected. See *Itid*]

"Stating the material facts" —Where there can be no doubt on the facts reported by the Police and accepted by the Magistrate, that there was a most serious riot apprehended, a Magistrate is fully justified in issuing an emergent order under this section, and the mere omission to set out in the order the material facts and the grounds of his action will not justify an interference with the order—18 Cr L J 892 (Cal)

Evidence —An order under this section must be based upon proper evidence. In the absence of such evidence, the Magistrate cannot pass an order merely on the complaint of one party—20 C W. N 981, or merely on the strength of a Police report (13 W R 19, 11 W R 46) without hearing the petitioner or giving him an opportunity of being heard—21 W R 46. But it has been held in 1917 M W N 724, that the reports of the Police Inspector and the village Munsiff may furnish the materials on the basis of which an *ex parte* order under this section may be issued and the defect on this score is but a mere irregularity not affecting the jurisdiction of the Magistrate.

So also, the Magistrate cannot act upon mere surmise or assumption (11 W R 46) or personal apprehension not based on any evidence—35 Cal 876.

Order—Nature and contents —(a) The order must be in writing, the words in the section are 'written order'. There must be a written order directed to the accused and duly promulgated before a man can be prosecuted for disobedience to the order—1905 P R 36.

(b) The order must contain a statement of the "material facts" which the Magistrate considers to be the facts of the case, and upon the footing of which he bases his order—10 W R 53, 32 Cal 935. In the case of an *ex parte* order, the material facts include the circumstances showing why the Magistrate was temporarily unable to prevent a breach of the peace by intending peace breakers—1917 M W N 724. Where

breach of the peace, he can restrain temporarily the exercise by any private person of his lawful rights to prevent that result—5 C W N 329

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service is an order restraining a person from doing a 'certain' act, and is valid—19 Cr L J 933 (Mad)

'Takes certain order with respect to property' —*Property whether moveable or immovable* —It has been held in 12 W R 38 that the power conferred by this section refers only to and is restricted to immovable property of the kind set forth in the next Chapter. The Magistrate cannot make an order regarding the custody of money, in respect of which a breach of the peace is likely to take place. See also 19 Cal 127. But there is nothing in the section to justify this view.

Property outside jurisdiction —No order can be made by a Magistrate under this section when the property in respect of which the order is made is situated outside the local limits of his jurisdiction—2 C W. N 572

Orders under the section —The following orders can be passed by a Magistrate under this section,—

(a) An order prohibiting burials in certain places on sanitary grounds—2 Weir 64.

(b) An order directing that two rival sects of Muhammadans should enter and worship in a particular mosque only at particular hours—24 Mod 262;

(c) An order to the priests of a temple to heighten and widen the doorway, so as to prevent overcrowding of pilgrims—6 B H C R 36.

(d) An order that certain persons should abstain from interfering with the Badves in the performance of their daily puja of the god *Vishoba*, is a valid order, if the Magistrate is of opinion that the interference with the puja is likely to cause annoyance to the worshippers—4 Bom L R 582.

(e) An order prohibiting a procession on the ground that the Magistrate would not be able to prevent a breach of the peace with the force at his disposal—15 Cr L J 30 (Mad).

(f) An order prohibiting a meeting, if owing to the prevalence of ill feeling between certain persons likely to attend the meeting a breach of the peace is to be apprehended—(1916) U B R 2nd Q 157

Improper orders under this section —A Magistrate is competent to issue an order to abstain from certain act or take certain order with certain property, and such an order can be passed under this section, only when the object of the order is to prevent obstruction, annoyance or injury to any person or danger to human life, health or safety, or a disturbance of the public tranquillity or a riot or an affray, and when immediate prevention or speedy remedy is necessary. Therefore the following orders, not being orders passed with the above objects in view, are not valid orders under this section —

the order did not state the material facts, it was set aside—32 Cal 935, 1913 M W N 1023 See also 18 Cr. L. J. 892 cited above

(c) The order must be *specific and definite* in its terms. A vague and indefinite order that the petitioner or any of his friends or servants should not go to a particular village (2 C W N 422) or that the petitioners ought not to commit any act which is likely to induce a breach of the peace, and not to take forcible possession of a village not in their possession, is bad in law—11 C W N 121

(d) The order must be confined to the *particular act* for which the danger is apprehended, any order prohibiting a course of conduct or an occupation involving a series of acts (e.g. an order prohibiting inoculation) done at certain intervals and spread over a period of time, is illegal and must be set aside—2 Weir 67

(e) The duration of the order must be *co extensive with the emergency*, it should not be wider than is necessary to prevent the emergency. The Magistrate cannot issue order intending to have effect for all time—2 Mad 140, 2 Weir 74. Thus, the Magistrate is not competent to pass an order directing that all processions should stop music when passing a certain place of worship at any time, when it is not shown that assemblies are held in that place for the purpose of worship at all hours of the day—2 Mad 140

(f) The order must *not be general* and sweeping in its terms. A Magistrate cannot in general terms forbid two parties to use any musical instrument in the neighbourhood of each others house; but he may forbid their doing so for the purpose of mutual annoyance—6 W R 40

(g) The order must not be in its nature irrevocable e.g. an order to cut down trees—13 W R 72, 32 Cal 154

Servica of order —The order must be served in the manner provided by sec 134, i.e. served personally. If the order is not proved to have been served personally a conviction under sec 188 I P C for disobedience of the order is illegal—Ratanlal 30

An order under this section is liable to be set aside if no notice is served upon the parties—1 P I T 44

Abstain from certain act —The words certain act means a definite act. An order directing a person not to collect rents from the ryots generally without mentioning any particular ryots is not an order to abstain from a 'certain' act—16 Cal 80, 19 Cal 127, 9 C W N 312. But an order directing a person not to interfere with the management of a particular temple or a particular *stuff* is a direction to abstain from a 'certain act' and is a valid order under this section—14 Mad 43, 15 Mad 314, 18 Mad 40. So also an order directing the trustee of a Vaishnav temple to abstain from interfering with the conduct of Adhyapakam

Clause (2)—*Ex parte* order —An *ex parte* order can be made only in cases of emergency—17 Cal 785, 3 B L R A C 4, 2 C W N 747 Ordinarily, in proceedings under this section, notice should be issued upon the person against whom the order is made, and an opportunity afforded to him to show cause why it should not be passed—10 W R 53, 19 Mad 18, 2 C W N 747

In the case of *ex parte* orders, the record of the Magistrate should disclose the existence of emergency which called for such *ex parte* orders and should show that there was no sufficient time to serve notice on the party affected thereby—1917 M W N 724 The record of the Magistrate should indicate with reasonable fulness the materials on which the Magistrate concluded that there was an emergency to justify the passing of *ex parte* orders affecting the liberty of persons—*Ibid*

Emergency —If unreasonable people threaten to commit a breach of the peace the Magistrate ought not to treat it as a case of emergency, unless through temporary circumstances the Magistrate had no sufficient police or other force at his command to prevent an immediate breach of the peace and unless he is further unable to find out the persons threatening to commit a breach of the peace so as to bind them over to keep the peace—1917 M W N 724

Clause (3) —Order to whom to be addressed —In 8 All 99, the Magistrate issued a proclamation, forbidding any person spreading night soil on his fields so as to cause disease It was held that the order was *ultra vires* and not within the scope of this section because the order issued by the Magistrate was not directed to the public generally frequenting or visiting a particular place, but was directed to a community This view of the law does not appear to be correct In 18 O C 70 it was held, and more correctly held that the words 'public generally' are not restricted to the corporate body pursuing its public avocations but also mean the whole number of individuals who in the circumstances cannot be particularly addressed The proper interpretation of this section is that the order may be directed to a particular individual, but when owing to the number of particular individuals it is impracticable to address each of them individually, an order under this section may be issued to the whole number of particular individuals This is the plain meaning of this clause, and in this view of the law, the order passed by the Magistrate in 8 All 99 was a valid order

Frequenting or visiting a particular place —These words have been interpreted in 14 Bom 165 to mean that the order can be directed to the public generally, only when frequenting or visiting a particular place Therefore where, owing to the prevalence of cholera, the District Magistrate issued a notification in the form of a proclamation forbidding

trate puts himself in a position to effectively and conclusively settle the dispute between the parties. Otherwise the dispute might still exist at the end of two months—27 Cal 785, 1 P L T 72, 1 P L T 377, 1 P L T 369. Sec 144 applies only where possession is either undisputed or clear beyond any shadow of doubt, but where possession relating to immoveable property is disputed, the proper procedure is to take proceedings under sec 145 which will permanently settle the dispute so far as the Criminal Courts are concerned—1 P L T 377, 1 P L T 72, 2 P L T 484. In cases of apprehension of a breach of the peace the Magistrate may act under sec 144, 145 or 107. See notes under sec 107.

Section 144 is of *general* application, and contains nothing which ousts the Magistrate's jurisdiction to proceed under sec 107 or 145. Therefore where section 107 or 145 will meet with the requirements of the case, section 144 is not an appropriate remedy, and if it is found that the danger was not so imminent and that it could be otherwise averted, an order under sec 144 will be generally held to have been made without jurisdiction—3 P L T 573 (F B).

The use of sec 144 is a suitable method of avoiding a breach of the peace, only if it is clear that the claim of the party creating the disturbance is not a claim made in good faith—3 P L J 243. If the Magistrate is satisfied that one of the parties is in possession, and that another person whose claim to possession is a mere pretence is threatening to interfere with that possession, the Magistrate is bound to maintain the party in possession, and forbid the party who is not in possession by a summary order under sec 144 of the Code—3 P L T 573 (F B), 19 Cr L J 113 (Pat). If on the expiry of the injunction under section 144, there is any further apprehension of a breach of the peace the appropriate procedure would be to take proceedings under sec 145 (but not under sec 107)—19 Cr. L J 367 (Cr).

The subsistence of an order under section 144 does not take away the power of the Court to take proceedings under section 145. Therefore, where in a dispute between the trustees of a temple as to possession and management of the temple and its properties, an order under section 144 was passed and during the subsistence of that order proceedings under section 145 were initiated and pending final orders the properties were attacked and a receiver was appointed, *et cetera* the procedure was not illegal—27 N L T 234. So also when proceedings are initiated under section 144 with respect to land the possession with regard to which is honestly disputed the Magistrate would be acting properly in converting the proceedings into those under sec 145 and making an order under the latter section—3 P L T 573.

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N 169 Thus, an order prohibiting a landlord for *ever* holding *habs* on his land on certain days is illegal—5 Cal. 7. So also an order that a certain person should abstain from taking any part in the management, *till* another is duly evicted from management, is *ultra vires*—24 Mad 45; so also, an order that no rents should be collected from the tenants by their contending landlords *until* their rights have been established by a Civil Court—8 C. L. R. 231; or an order directing a party not to interfere with the land without the order of a competent Court—7 C. W. N. 140

A temporary injunction can be passed under this section even though the dispute demands a permanent injunction for final settlement. Thus, where disputes were going on between the applicant and the opposite party, and the latter used to strike a bell continuously at night time in order to annoy the applicant, who thereupon applied to the Magistrate for an injunction, *held* that the Magistrate could pass a temporary order under this section—21 Bom. L. R. 157 (per Hayward J.), but Shah J. *held* that the Magistrate could pass no order under this section because the applicant's application was for the prevention of a nuisance not temporary but permanent.

Non specification of time—An order under this section is not bad merely because it does not state that its operation is confined to two months or some shorter period. Under this subsection, it will be presumed in the absence of anything to the contrary that the duration of the order is limited to the full period of two months—34 Cal. 897, (1919) M. W. N. 872. In another case the Madras High Court holds that an order which is indefinite as to time is to that extent without jurisdiction—42 M. L. J. 357.

Extension of time by successive orders—A Magistrate cannot, by passing successive orders, extend the operation of this section beyond the time limit prescribed by this section—11 C. W. N. 79, 20 C. W. N. 758; 1 P. L. T. 44, (1912) M. W. N. 612. If there is really a very serious danger of a breach of the peace he can take action under section 107—3 P. L. J. 133; 13 C. W. N. cclxxiii. But he cannot under the shelter of this section, assume a jurisdiction to prohibit persons by a permanent injunction, by arbitrary and successive renewals of orders—38 Mad 489, 1913 M. W. N. 1003, 7 C. W. N. 140. If he does so, the High Court has power under sec. 15 of the Charter Act to interfere in revision—38 Mad 469.

Revision—Subsection (3) of section 435 which disallowed the powers of revision of the High Court, the Sessions Judge etc., in respect of proceedings under Sec. 144 has now been omitted, and the effect of the omission is to overrule the following decisions in which it was held that the High Court had no power to interfere in revision with orders under this

section—18 Mad. 402, 30 Mad. 548; 5 Cal. 875, 3 Mad. 354, 2 Cal. 293; Ratanlal 516, 2 Weir 91. Under the present law, not only the High Court but also the Sessions Judge, the District Magistrate and the Subdivisional Magistrate can revise an order passed under this section.

But the High Court does not ordinarily interfere in revision with an order under this section when other remedies are open to the aggrieved party, especially because the High Court is loath to reject the opinion of the Magistrate responsible for the peace of his locality that there is an emergency which justified an *ex parte* order—1917 M. W. N. 724. The Magistrate is the sole Judge as to whether the material is sufficient or not to justify an order under this section—19 Cr. L. J. 113 (Pat).

But if the order under this section is *ultra vires*, or illegal, or does not come within this section, the High Court can interfere—38 Mad. 487, 19 Cal. 127, 8 Cal. 580, 2 A. W. N. 140, 18 Mad. 41, 21 W. R. 26, 22 W. R. 24, 22 W. R. 78, 23 W. R. 34, 24 W. R. 30, 22 A. W. N. 174, 9 Cal. 103, 16 Cal. 80, 25 Cal. 852, and the High Court can set aside an order under this section even though two months had expired from the date thereof—23 C. W. N. 145, 20 C. W. N. 758, 20 C. W. N. 981, 42 M. L. J. 352.

Reference.—An order under this section not being a judicial proceeding, a District Magistrate cannot refer it to the High Court, but can himself deal with it in his executive capacity—Ratanlal 129. Or the party aggrieved by the order may apply to the District Magistrate to recall the order, and failing him, to the Local Government—Mad. 11 C. Pro. 5, 12, 1879.

Order by Executive officers.—Where an executive officer passes an order for preventing a breach of the peace, the propriety of such orders cannot be questioned by appellate judicial authorities in that state of things. But when the orders are enforced by the infliction of penalties, Courts can see whether the order was proper or not—6 Cal. 88.

Punishment.—See sec. 188 I. P. C.

The Magistrate issuing the order under this section cannot himself punish a man for disobeying his order—20 C. W. N. 981, 10 B. H. C. R. 424, Ratanlal 50, 4 C. W. N. 226.

Civil suit.—An order under this section is not a bar to the institution of a civil suit by the party on whom the order is made. Therefore, where the plaintiffs and the defendants are owners of adjoining properties and the defendants obtained an order of the Magistrate under sec. 144 preventing the plaintiffs from erecting certain buildings on their own property, without adjudication of the private rights of the parties, it is open to the plaintiffs to sue the defendant for a declaration that

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A temporary injunction can be passed under this section even though the dispute demands a permanent injunction for final settlement. Thus, where disputes were going on between the applicant and the opposite party, and the latter used to strike a bell continuously at night time in order to annoy the applicant, who thereupon applied to the Magistrate for an injunction, *till* that the Magistrate could pass a temporary order under this section—2 Bom L R 157 (per Hayward J), but Shah J held that the Magistrate could pass no order under this section because the applicant's application was for the prevention of a nuisance not temporary but permanent

Non est if ition of time—An order under this section is not bad merely because it does not state that its operation is confined to two months or some shorter period. Under this subsection it will be presumed in the absence of anything to the contrary that the duration of the order is limited to the full period of two months—54 Cal 897, (1919) M W N 812 In another case the Madras High Court holds that an order which is indefinite as to time is to that extent without jurisdiction—42 M L J 352

Extension of time by successive orders—A Magistrate cannot, by passing successive orders, extend the operation of this section beyond the time limit prescribed by this section—11 C W N 9, 10 C W N 758, 1 P. L. T 44, (1921) M W N 612 If there is really a very serious danger of a breach of the peace he can take action under section 107—3 P. L. J 130, 13 C W N 221 But he cannot under the shelter of this section, assume a jurisdiction to prohibit persons by a permanent injunction, by arbitrary and successive renewals of orders—38 Mad 489, 1913 M W N 1003, 7 C W N 140 If he does so, the High Court has power under sec 15 of the Charter Act to interfere in revision—38 Mad 489

Revision—Subsection (3) of section 435 which disallowed the powers of revision of the High Court, the Sessions Judge etc., in respect of proceedings under Sec 144 has now been omitted, and the effect of the omission is to overrule the following decisions in which it was held that the High Court had no power to interfere in revision with orders under this

section —18 Mad 402, 30 Mad 548, 5 Cal 875, 3 Mad 354, 2 Cal 293, Ratanlal 516, 2 Weir 94 Under the present law, not only the High Court but also the Sessions Judge, the District Magistrate and the Subdivisional Magistrate can revise an order passed under this section

But the High Court does not ordinarily interfere in revision with an order under this section when other remedies are open to the aggrieved party, especially because the High Court is loath to reject the opinion of the Magistrate responsible for the peace of his locality that there is an emergency which justified an *ex parte* order—1917 M W N 724. The Magistrate is the sole Judge as to whether the material is sufficient or not to justify an order under this section—19 Cr L J 113 (Pat)

But if the order under this section is *ultra vires*, or illegal, or does not come within this section, the High Court can interfere—38 Mad 489, 19 Cal 127, 8 Cal 580, 2 A W N 140, 18 Mad 41, 21 W R 26, 22 W R 24, 22 W R 78, 23 W R 34, 24 W R 30, 22 A W N 174, 9 Cal 103, 16 Cal 80, 25 Cal 852, and the High Court can set aside an order under this section even though two months had expired from the date thereof—23 C W N 145, 20 C W N 758, 20 C W N 981, 42 M L J 352

Reference —An order under this section not being a judicial proceeding, a District Magistrate cannot refer it to the High Court, but can himself deal with it in his executive capacity—Ratanlal 129 Or the party aggrieved by the order may apply to the District Magistrate to recall the order, and failing him, to the Local Government—Mad H C Pro 5 12 1879

Order by Executive officers —Where an executive officer passes an order for preventing a breach of the peace, the propriety of such orders cannot be questioned by appellate judicial authorities in that state of things But when the orders are enforced by the infliction of penalties, Courts can see whether the order was proper or not—6 Cal 88

Punishment —See sec. 188 I P C

The Magistrate issuing the order under this section cannot himself punish a man for disobeying his order—20 C W N 981, 10 B H C R. 424, Ratanlal 50, 4 C W. N 226

Civil suit —An order under this section is not a bar to the institution of a Civil suit by the party on whom the order is made Therefore, where the plaintiffs and the defendants are owners of adjoining properties and the defendants obtained an order of the Magistrate under sec 144 preventing the plaintiffs from erecting certain buildings on their own property, without adjudication of the private rights of the parties, it is open to the plaintiffs to sue the defendant for a declaration that

they are entitled to make use of their property and erect buildings on it as they desire, and for an injunction restraining the defendants from interfering with them in so doing, and the order under section 144, far from being a bar to such suit, would itself furnish the cause of action for the suit—42 M L J 179

Proceedings judicial —Enquiries under this section before an order is issued are judicial proceedings within the meaning of sec 4 (m), and the Magistrate can take action under sec 476 if he thinks that false evidence has been given before him—19 Mad 18 (Section 476 as now amended in 1923 is not limited to *judicial* proceedings, but applies to *any* proceeding)

[*Proposed Amendment* —During the debate in the Legislative Assembly, Bhai Man Sing, M L A, moved an amendment which proposed the addition of elaborate provisions for enquiry and the recording of evidence by the Magistrate. He said that those provisions were necessary to enable the Revisional Court to see whether the order was justified in case a person convicted applied for the revision of an order passed on him]

Dr Nandlal supported the motion. Mr Subramanyam opposed it as being unnecessary. Mr Tonkinson said that the section dealt with speedy remedy and immediate prevention. The amendment, if carried would entirely change the character of the section by bringing in all the paraphernalia of a summons trial.

The amendment was rejected. See the Debates of the Legislative Assembly, January 25 1923.]

[*Another proposed amendment* —During the debate, Mr Rangachariar moved an amendment, which proposed similar safeguards to those which he made an abortive attempt to introduce into section 107. It was as follows —“In all cases where action is taken under this section preventing a person or persons from holding or addressing meetings, a report shall forthwith be made to the Sessions Judge who may call for and examine the record of any proceedings for the purpose of satisfying himself as to the correctness, legality or propriety of the same and pass such orders as he thinks fit”]

In moving this amendment, Mr Rangachariar appealed to all those present and to the Government Benches to accept his modest proposal. The speaker said he had other and more efficacious means of dealing with the section. He could have moved the deletion of the objectionable provisions which deprived a citizen of the lawful exercise of his right to hold and address public meetings, but he had not done so because he believed that in extreme cases such a provision was necessary. No such provision existed in England. There the police

used batons as their weapons and not fire arms. In England processions and demonstrations could not be prohibited but in India if tomorrow they wanted to demonstrate against the appointment of the Royal Commission on the public services the Deputy Commissioner of Delhi may prohibit them from doing so. It was in Burma in 1916 that the novel use of Section 144 to prevent public meetings had its birth and in 1921 it spread like wildfire in India. When he moved similar safeguards in the case of Section 107 Government said they would be ineffective, but the non-officials had at least the shrewdness to understand that Government opposed them because they were really effective.

Sir Malcolm Hailey said that even if Mr. Rangachari had any care for the provision of his safeguards in Section 107, he had none in the case of Section 144. Proceedings under the latter Section was essentially urgent and merely temporary, lasting only two months. Even if a report was sent to the Sessions Judge considerable time must pass before the Judge could give any decision and after two months the order would itself automatically lapse. The Home Member also pointed out that in the old Imperial Legislative Council, of which Mr. Gokhale was a member, Government was told by the Indian members to resort to the powers given to them by the ordinary law under Section 144. The Section 144 which the Assembly was now discussing was materially different from what it was in the days of the old Imperial Council when that suggestion was made. To day it provided for semi-judicial proceedings liable to revision, in the place of executive action.

Mr. Seshagiri Iyer said there was in the country a feeling of consternation at the misuse of the section and the amendment proposed would be useful in checking the vagaries of the Magistrate by enabling the Sessions Judge to see whether the Magistrate had done right or gone wrong. The Section was originally framed only to give facilities to certain minorities in the exercise of their rights if threatened and was never intended for the political use which had been made of it by Government. The amendment provided a safety valve and the House should accept it.

Mr. Percival showed that the High Courts had held that Section 144 was used rightly for the purpose for which it had been used.

Sir Henry Stanyon said that to quote the absence of the provisions of Section 144 in English law was irrelevant because the character and composition of the two peoples differed. The Section provided for steps immediate and prompt to meet an emergency, and knowing as he did from A to Z of the senior judicial machinery, he was sure that as a

general rule before a Sessions Judge passed his orders the two months' order under the Section would have lapsed

Mr Rangachariar's motion was put to the vote and rejected See the *Debates of the Legislative Assembly* January 25 1923]

CHAPTER XII

DISPUTES AS TO IMMOVEABLE PROPERTY

In proceedings under this Chapter, the Magistrate should distinctly indicate under what section of the Code he takes proceedings It should not be left to the higher Courts to speculate to see under what section the order was passed—18 Cr L J 295 (Mad)

145 (1) Whenever a District Magistrate, Sub divisional Magistrate or Magistrate of the first class is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction he shall make an order in writing, stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute

Procedure where dispute concerning land etc is likely to cause breach of peace

(2) For the purposes of this section the expression 'land or water' includes buildings, markets fisheries, crops or other produce of land, and the rents or profits of any such property

(3) A copy of the order shall be served in manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute

(4) The Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive *all such evidence as may be* produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject

Provided that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed he may treat the party so dispossessed as if he had been in possession at such date

Provided also, that, if the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute, pending his decision under this section

(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed, and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub section (1) shall be final

(6) If the Magistrate decides that one of the parties was or *should under the first proviso to sub section (1) be treated as being* in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law and forbidding all disturbance of such possession until such eviction, *and when he proceeds under the first proviso to sub section (4), may restore to possession the party forcibly and wrongfully dispossessed*

(7) *When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased*

party to be made a party to the proceeding, and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purpose of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto

(8) *If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale-proceeds thereof, as he thinks fit.*

(9) *The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue summons to any witness directing him to attend or to produce any document or thing,*

(10) *Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under Section 107.*

Change—The amendments as shown by the italicised words have been effected by sec 27 of the Criminal Procedure Code Amendment Act (XVIII of 1923). The reasons have been stated below in their proper place.

Object and Scope of section—Sec 145 was intended to provide speedy remedy for the prevention of breaches of peace arising out of dispute relating to immoveable property—32 Cal 1093. The object of this section is merely to prevent a breach of the peace by maintaining one or other of the parties in possession—30 All 41, 30 Cal 135, 30 Cal. 112, 21 Cal 29. The object of this section is to enable a Magistrate to intervene and pass a temporary order in regard to the possession of property in dispute, having effect until the actual right of one of the parties has been determined by a competent Civil Court—26 Cal 625.

The scope of this section is merely a determination of actual possession for the purpose of preventing a breach of the peace pending a decision on the merits in a civil Court. This section does not provide for a decision by the Magistrate of any claims to a right to hold possession (or to reap crops—1917 P. W. R. 28

Secs 107, 144 and 145.—As to whether a Magistrate should proceed under Sec. 107 or 144 or 145, in case of disputes relating to immovable property between the rival parties likely to cause a breach of the peace, see notes under Secs. 107 and 144, under heading "Disputes relating to immovable property" where the subject has been fully discussed.

Where a Magistrate initiated proceedings under Sec. 144 and at a later stage intimated to the parties who were present in Court his intention to draw up proceedings under sec. 145, *held* that the Magistrate was not guilty of any irregularity—19 Cr. L. J. 396 (Pat.)

Nature of proceedings under this section.—A proceeding under this section is taken for the prevention of crime, it does not arise out of or deals with a crime already committed. Therefore a proceeding under this section is not a criminal case, within the meaning of Sec. 526—25 Bom. 179, 85 L. R. 215, 1914 P. R. 5. An action taken under this section is a quasi executive action—25 Bom. 179. A proceeding under this section is in reality a civil one—33 Cal. 68. *Contrast*—26 Mad. 188, 2 C. L. J. 614, 34 All. 533, 2 P. L. I. 106 and 11 O. C. 61, where it is held that a case under this section is a criminal case and the High Court has power to transfer it under Sec. 526 of this Code, or under clause 29, Letters Patent. The person proceeded against under this Chapter is an accused within the meaning of Sec. 360 of the Code—3 P. L. T. 291.

Though the Court dealing with a case under this section is a criminal Court, yet an order under this section is not one made in a criminal trial within the meaning of Sec. 15 of the Letters Patent, and therefore an appeal lies from an order of a single Judge of a Chartered High Court—17 M. L. J. 158.

Competency of Magistrates —*Bench of Magistrates* —A Bench of Magistrates exercising first class powers may be invested by virtue of Sec. 15 (2), with powers to take proceedings under this section. The decision in 3 Cal. 754 under the old Code of 1872 is no longer good law.

"Is satisfied" —Before taking proceedings under this section, the Magistrate must satisfy himself that there is an existence of a dispute likely to cause a breach of the peace, and that the suggested apprehension of the breach is not merely colourable and made to induce him to deal with matters properly cognisable by Civil Courts—10 Cal. 78. It is necessary that the Magistrate should himself inquire into the likelihood of a breach of the peace, and should come to a judicial decision upon it. It is that judicial decision which is the foundation of the subsequent investigation, and without it the investigation is void and inoperative—9 W. R. 64, 4 C. W. N. 779. An order of the Magistrate merely on the complainant's petition, without determining whether any breach of the peace was likely to occur, or enquiring whether the accused had

any evidence, is bad in law, since the Magistrate has failed to find the facts that were necessary to constitute the foundation of his jurisdiction—1885 P R 6

The ground stated by the Magistrate must be such as to satisfy a Court of Revision before which such case may be brought by any of the parties concerned—20 Cal 513

The fact that the Magistrate is satisfied as to the necessity of proceedings under this section must appear on the record—15 All 394 and in the first order directing the issue of notice—6 C P L R 21—2 Bom L R 84, 28 Cal 416, 4 M L T 213

If the Police report or other information shows that there is a dispute and the Magistrate believes it, and issues the preliminary order, basing his information on such report only, he acquires sufficient jurisdiction to act under this section and it is not necessary for him to set out any further reasons for his being satisfied as to the existence of such a dispute. His order is final and the High Court will not scrutinize the said reasons—5 L W. 165, 33 Cal 352

Power of High Court or Sessions Judge to direct proceedings—The Magistrate must satisfy himself and use his own discretion as to the necessity of proceedings. Therefore neither the High Court nor the Sessions Judge has power to order a Magistrate to take proceedings under this chapter—23 W R 58, 30 Cal 112, 20 Cal 520, 9 W R 64, so also the High Court has no power to direct the revival of proceedings after they have been stayed by the Magistrate—30 Cal 112

A District Magistrate has no authority to direct the Sub divisional Magistrate to institute proceedings under this section—24 Cal 391

Police report—A police report upon which a Magistrate bases his initial order under this section should contain a statement of the facts from which the Magistrate may be satisfied as to the existence of a likelihood of a breach of the peace. No rule can be laid down so as to specify the sufficiency of the materials upon which the Magistrate may take action, but there is no inflexible rule that the police report must show that the disputing parties are actually assembling men or doing some other specific overt acts—33 Cal 33. A Police report which sets out sufficiently substantial reasons for believing that a dispute likely to cause a breach of the peace relating to a certain land exists, is a good foundation of proceedings under this section—20 Cal 513. But a police report which does not state that there was any apprehension of a breach of the peace, is not sufficient to give the Magistrate jurisdiction under this section—6 C W N 340

A mere expression of opinion by a police officer without sufficient materials that a breach of the peace is likely to happen ought not to be

the foundation of an action under this section. Thus, where the police report showed that the parties disputing over a tank were big Zamindars, and that although there was nothing to show that a breach of the peace was likely to happen, yet such a breach was not impossible, it was held that the Magistrate ought not to proceed upon such report, which is merely an expression of opinion by the Police—11 C W N 835, 11 C W N 198, 33 Cal 33.

A Magistrate is in no way bound to act on all that is stated in the Police report before him—27 Cal 89. He must act from his own judgment and ought not to proceed upon a mere expression of opinion by the Police—33 Cal 33.

Evidentiary value—A Police report is not itself evidence although it may be sufficient to justify a Magistrate in taking action under this section—7 B L R 329. The police report and the evidence contained therein about the factum of possession is inadmissible in evidence in a proceeding under this section except for the purpose of initiating the proceeding—1 P L T 501.

Other information—The Code does not limit the materials on which the Magistrate may act. He may act on any information and without any formal complaint being made before him. He is not confined to evidence recorded on oath—19 W R 10.

But a telegram is not a sufficient information—22 Bom 956, so also, a statement made by a witness in the course of a trial that a dispute likely to cause a breach of the peace exists—20 Cal 520, or a mere petition by an officer in the employ of a party interested in the dispute, that a dispute likely to cause a breach of the peace exists, is not a sufficient basis of proceedings under this section—29 Mad 56r.

Dispute—The essence and basis of the jurisdiction which a Magistrate can exercise under this section depends upon there being a dispute likely to create a breach of the peace, and when the parties appear before the Magistrate, if they are able to show, or if it otherwise appears to the Magistrate that there is no dispute, or no such dispute as is likely to induce a breach of the peace, the Magistrate should hold his hands and not proceed further—6 Cal 835. Thus, when the rights of parties have been determined by a competent Court, the dispute is at an end, and it is the duty of the Magistrate to maintain the right of the successful party, and the defeated party will not be allowed to invoke the aid of the Magistrate and the police to neutralise the effect of the decree of the competent Civil Court—6 Cal 835, 26 Cal 625, 5 C W N 563, 29 Cal 268. The proper course for a Magistrate to pursue if the defeated party does any act that may probably occasion a breach of the peace, is to take action under sec 107 of the Code—6 Cal 835. See also 7

C W N 558 In 7 Mad 460 it has been held that a civil Court decree would not bar proceedings under sec 145 or 147, though it would be the wisest course to require a security bond under s-c 107 for keeping the peace As to the effect of prior decree of civil Court, see notes at the end of this section.

The term 'dispute' means a reasonable dispute, a bona fide dispute, a dispute between parties who have each some semblance of a right or supposed right—6 Cal 835 Where certain persons wrongfully and without any bona fide claim sought to eject another by force and a breach of the peace was imminent, it was held that the Magistrate was not bound to act under this section but might proceed under sec 107—28 All 406

Likelihood of breach of peace —The basis of the Magistrate's jurisdiction under this section is the likelihood of a breach of the peace Therefore, where in his order directing the issue of a proceeding under this section, the Magistrate was of opinion that there was *no likelihood* of a breach of the peace but that as the dispute was one relating to possession, section 145 was applicable, *held* that the Magistrate acted without jurisdiction—24 C W N 621 Where the police report did not disclose that there was any apprehension of a breach of the peace, the Magistrate's order was without jurisdiction—1 P L T 387

The term 'likely' in this section does not mean that the breach of the peace complained of must be imminent or likely to happen immediately, but simply signifies that there should be a probability or a likelihood of a breach of the peace—1 S L R 50 A Magistrate is entitled to take proceedings under this section when a breach of the peace is likely, it is not necessary that it should be imminent—33 Cal 33 But a mere probability that a breach of the peace may occur if no proceedings are taken, will not justify the Magistrate in taking action under this section—the Magistrate must be satisfied of the existence of a dispute likely to induce a breach of the peace, rendering it necessary for him to take immediate steps for its prevention—7 Cal 385 An order under this section will be justified if there is an immediate danger of a breach of the peace—8 C W N 590 If there be no present danger of a breach of the peace, the fact that a breach may happen at a future time will not justify an order under this section—7 C L R 352

The Magistrate must decide in each case, whether there is a likelihood of a breach of the peace and it is not enough on the one hand that the breach is more probable nor is it necessary that it should be imminent as indicating a higher degree of chance of the event happening than is denoted by the likelihood of it—33 Cal 33

Where a party was acting properly and within his rights, there is no reason to suppose that any breach of the peace was likely to be committed by him—3 C W. N 463

There must be a likelihood of a breach of the peace on the date on which the Magistrate draws up proceedings. He cannot take proceedings on the strength of a Police report which is more than three months old, when he has no information that a breach of the peace is likely to occur at the time of his taking action—2 P. L. T. 650

Non existence of dispute --Where the materials before the Magistrate do not disclose the existence of such dispute as is likely to result in a breach of the peace, the order made by him under this section would be entirely void, and the defect will not be cured even if it appears from the evidence in the course of the trial that there was at the date of the initiation of the proceedings a dispute likely to cause a breach of the peace—23 Cal 157. The mere fact that a person complains of being dispossessed of his land is no reason for the institution of proceedings under this section, if the petition made by the complainant refers only to the commission of various offences, none of which necessarily involves a breach of the peace—4 C W N 57

If it is found during the proceedings that there is no likelihood of the peace being disturbed, there is no necessity for continuing the proceedings—21 Cal 29. The Magistrate has jurisdiction to decline to proceed with the inquiry, whenever it is shown to his satisfaction that the dispute no longer exists or that the danger has disappeared—4 L. W 57

Enquiry and Record —A Magistrate who purports to act under this section must enquire into the question whether a dispute likely to cause a breach of the peace exists and must record a judicial decision thereon—1917 P. W. R. 25, 2 Weir 117, and must also record the ground of his belief as to the existence of such likelihood—4 Cal 650

Subject matter of dispute —Land or water —The words in the 1882 Code were 'tangible immoveable property'. The section of the present Code does not limit the action of a Magistrate to disputes relating to the possession of tangible immoveable property, but it empowers him to take cognisance of a dispute likely to cause a breach of the peace concerning any land or water or boundaries thereof, and subsection (2) gives an explanation of the words 'land or water'—26 Cal 188. See notes under subsection (2) *infra*

Property must be specified —To bring a case under this section, the property which is the subject of dispute must be capable of being accurately defined—23 Cal 80. Therefore a Magistrate cannot proceed

under this section, in the case of a dispute about an undivided share of land, or rent or profit issuing from such undivided share, because the subject matter of the dispute is uncertain, and the boundaries of the land are undefined—7 C W N 462

Before a proceeding is drawn up by the Magistrate, the subject matter of the dispute should be clearly determined—11 C W N 198; 7 C W. N 599. Absence of clear specification of the subject matter of dispute in the proceedings is a serious defect—24 C W N 621. But where the parties are not at dispute upon the question as to what the disputed lands are, the real question being which party was entitled to possession under a civil Court decree, the want of a proper specification of the boundaries of the property will not vitiate the proceedings—5 C W N 563, 1 P L T 369

An order under this section which does not specify by metes and bounds the lands in dispute may be amended by the Magistrate himself—2 Weir 107. But an order which gives no information as to the subject-matter of dispute and which leaves the persons to whom notice is ordered to be issued quite in the dark as to the property in regard to which they have to put forward their respective claims, is not merely defective but invalid and liable to be set aside in revision—27 All 296

Within jurisdiction—This section does not authorise a Magistrate to pass orders respecting lands situate outside the local limits of his jurisdiction—17 W R 33. Therefore where a *jalkar* was situate partly within and partly without the local limits of his jurisdiction and proceedings were taken with regard to the *jalkar* as a whole, the whole proceedings were set aside and the Magistrate was allowed an option to institute fresh proceedings with regard to such portion of the *jalkar* as came within his jurisdiction—1 C L J 329

Where it is uncertain in which of two local areas the land in dispute is situated, proceedings may be taken by a Magistrate having jurisdiction over any of such areas—12 O C 400. See also 16 Cr. L J 527 (All)

A Magistrate of one district has jurisdiction to institute proceedings under Sec 145 on a report drawn up by a police officer of another district in respect of such portions of the land or water as lie within the limits of his jurisdiction—29 Cal 885

Order—The making of a formal order under sub section (1) is absolutely necessary to the initiation of proceedings under this section—15 A L J 270, 1917 P W R 22, 1917 P W R. 28, and an omission to make such an order and to draw up a proceeding under sub section (1) will render all subsequent proceedings void—32 Cal 552, 30 Cal 443, 4 W. R 26, 1 C L J 432, 1917 P W R. 28, 20 Cr L J 124 (Oudh),

6 C. W. N 923; 2 P. L. T. 724. In 5917 P. W. R. 22 (following 1914 P. W. R. 15) however, it has been held that the omission to record the preliminary order is not a fatal defect, if no prejudice has been caused thereby. So also, in 1917 P. W. R. 26, the omission to record a preliminary order in writing or to serve it on the parties did not invalidate subsequent proceedings, where the parties appeared before the Magistrate who explained matters to them fully, and the parties evidently understood everything that was requisite. See also 22 W. R. 81.

It is essential that the provisions of the section must be strictly complied with, otherwise the order must be deemed to have been made without jurisdiction, where no order was recorded, no notice issued, no written statements called for, and no inquiry held, the order must be deemed to be an order without jurisdiction and therefore void—25 All. 537, 1916 P. R. 22; 1915 P. W. R. 32.

An order under this section must state all the particulars necessary to enable the Magistrate to act under the section, otherwise the proceedings are without jurisdiction. It is not sufficient that the Magistrate should have before him a police report, that he should have given orders thereon and that a written order be drawn up according to the terms of this section. It is his duty to draw up an order which in all respects satisfies the requirements of law. The written order should be correct and complete in its terms—27 Cal. 981.

"The essential points to be kept in mind in connection with proceedings under this section are as follows:—

(a) The Magistrate should in his order, which must be in writing, declare himself satisfied from a proper report or other information, and for reasons given, that a dispute exists concerning land within the local limits of his jurisdiction, and that the dispute is one likely to cause a breach of the peace.

(b) When land is in dispute, the boundaries should be duly defined in the order, and care should be taken to include nothing beyond the subject of the dispute.

(c) The order should proceed to require the parties concerned in the dispute to attend the Magistrate's Court in person or by pleader on a certain date, to file written statements of their respective claims as regards the fact of actual possession, and to be prepared with their oral and documentary evidence there and then.

(d) The date should be so fixed as to allow reasonable time for the due service and return of the notice promulgating the order and the production of evidence.

(e) A copy of the order should be published and affixed at or near the subject of the dispute.

(f) The forms prescribed in Sch V should be used, such modifications being made therein as the circumstances of the case may require"—*Cal G R. & C. O* pp 10, 11

Statement of grounds—A Magistrate's order in instituting proceedings under this section ought to set out the grounds on which he is satisfied that a dispute likely to cause a breach of the peace exists—28 *Cal* 416, 11 *A L J* 696, 6 *C P L R* 21, 2 *Bom L R* 84, 2 *P L T* 267 Even where the Magistrate acts upon a local inquiry held by himself, he is still bound to state the grounds upon which he is satisfied that there is a likelihood of a breach of the peace—32 *Cal* 771

Omission to state grounds—The object of drawing up a proceeding prior to the issue of notice is to inform the parties of the grounds of information which satisfy the Magistrate that a dispute exists—7 *C W. N* 599 For it is the intention of the law, not only that the Magistrate should have sufficient ground for proceeding under Sec 145 but that he should inform the parties concerned the grounds on which he is proceeding—20 *Cal* 520 Therefore, where the Magistrate omits in the preliminary order to state the grounds of his being satisfied as to the likelihood of a breach of the peace, the final order is without jurisdiction and must be set aside—32 *Cal* 771 2 *Bur L J* 32 But the Allahabad High Court holds that failure on the part of the Magistrate to set forth explicitly the grounds of his being satisfied that there was a likelihood of a breach of the peace will not vitiate the proceedings if there was otherwise a substantial compliance with the requirements of this section—25 *A W N* 260, 18 *A L J* 1140, 4 *A L J* 91 In 4 *A W N* 317, it has been held that the omission to state the grounds is a mere irregularity which would be cured by Sec 537 The Madras High Court also lays down that once the Magistrate is satisfied that a dispute exists likely to cause a breach of the peace, he has jurisdiction, and his subsequent action must be considered in relation to procedure and not to jurisdiction The irregularity, if any, would be cured by section 537 of the Code—36 *Mad* 275, and in 30 *Mad* 548 and 2 *Weir* 98, the High Court refused to interfere in revision unless either of the parties had been prejudiced by the omission to record the ground of satisfaction

But in his final order, the Magistrate should sufficiently state his reasons, so that the High Court in revision may determine whether or not the Magistrate has complied with the provisions of sub section (4), and directed his mind to the consideration of the evidence—49 *Cal* 187

Where neither the preliminary order nor the final order stated in writing that the Magistrate was satisfied that the dispute was likely to

cause a breach of the peace, the proceedings were set aside as illegal—4 A. W. N. 317.

A mere omission by the Magistrate to record the source of information will not invalidate the proceedings, where the Magistrate held the inquiry in the presence of the parties, and they were aware of the fact in the course of the inquiry—7 C. W. N. 599

Where the Magistrate omitted to state in detail the grounds of his satisfaction that a breach of peace is likely to happen, but referred to a petition which contained such grounds and also recorded that there was no denial of the same by the opposite party, it was held that there was a substantial compliance with the provisions of this section and that the order was valid—16 M. L. J. 148

Reference to Police report—An initial order made by the Magistrate under sub sec (1) is not defective merely because it is not self contained and does not state in express terms the grounds upon which he is satisfied, when such grounds appear in the police report upon which it is founded and to which it makes reference, and which is incorporated in it—33 Cal. 352; 13 Cal. 175. Where the police report sets out sufficient grounds and is expressly referred to in the initial order by the Magistrate, such order sufficiently fulfils the requirements of the law—33 Cal. 352. But it is remarked in 7 Cal. 46 that it is the duty of the Magistrate to record distinctly what the law requires to be recorded and he performs his duty in an unsatisfactory manner if without stating the grounds he merely refers to a police report.

Parties concerned—Before entering on an inquiry under this section, the Magistrate ought to satisfy himself to the best of his ability on the information before him, as to who are the persons claiming to be in the present possession of the subject of dispute (but he is not concerned to ascertain what persons have or claim to have mere rights to possession)—30 Cal. 155. It is the duty of the Magistrate on the materials before him, to ascertain, so far as he can, who are the persons interested in or claiming a right to the property in dispute, and to give notice to them all so that the whole matter, so far as his Court is concerned, may be disposed of in one proceeding—21 Cal. 29, 27 Cal. 892, 4 C. W. N. 753, 24 Cal. 55, 24 Bom. 527, 6 C. W. N. 101.

The provisions of this section make it clear that the parties whom the Magistrate has to deal with are not merely the actual parties to, but all persons who may be concerned in the dispute, the object being to prevent a breach of the peace—11 Bom. L. R. 377. The words 'parties concerned in the dispute' mean not only the persons who are actually disputing but all persons interested in or claiming to be in possession of

the property in dispute—27 Cal 892, 30 Cal 155; 21 Cal 29, 5118, 18 Mad 51. But these words do not mean that all parties interested in or claiming a mere right to possession should be or are entitled to be made parties to the possession. A claim merely to a right to possession, as distinguished from a claim to be in possession, would be outside the scope of the inquiry—30 Cal 155.

Absent parties —The words "parties concerned in the dispute" are not limited to the parties actually concerned in the dispute but also include all persons really interested in the subject matter of the dispute even though they be absent, and a notice of the preliminary order should be served on such persons also. The object of the law is to obtain a settlement of disputes, and if it were possible to decide under this section disputes regarding possession of land in the absence of a person really interested in the subject matter of dispute the result would be that an order declaring the possession of one of the parties to the proceedings would either operate mischievously to an absent party, or from the fact that such an order was passed behind his back, it would inevitably lead, not to a termination of the dispute, but to a renewal of it in a different direction and between other parties. That is not clearly the object of the law, but the object of the law is to obtain a settlement of disputes regarding the possession of land—4 C W N 753.

Owners, occupiers —This section concerns owners as well as occupiers. When a zemindar has let his lands in farm he and his farmers and their occupying ryots are all in their degree concerned in the dispute as to possession and they ought to be maintained in the possession of the interest which they severally enjoy—5 C L R 287.

Landlords tenants —Where in a dispute concerning the ownership of land between certain zemindars and their tenants on one side and the other zemindars and their tenants on the other, the zemindars were made parties, but the tenants were not, it was held that the presence of the tenants was essentially necessary for the proper and effectual decision of the case, and the omission to join them as parties was illegal and without jurisdiction—27 Cal 892. Where the dispute existed only among the rival tenants of the rival zemindars and the zemindars not being concerned in the dispute did not move in the matter themselves, the omission to add the zemindars as parties to the dispute will not vitiate the proceedings—6 C W N 206.

Where the petitioners allege that the landlords have fraudulently attempted to dispute their possession by setting up false tenants as cultivators of the lands in dispute, the landlords are the real parties—4 C W N 748.

Agent or Manager or Servant.—The agent or manager is not a party concerned within the meaning of this section—21 Cal 915; 25 Cal 423; 7 C. W. N. 208, but if the actual proprietors are not resident within the jurisdiction of the Magistrate, an order under this section can be made in favour of the person who claims to be in possession as agent or manager of the proprietors—35 Cal 49. If both the master and servant are resident within the Magistrate's jurisdiction, the former must be made a party to the proceedings—6 C. L. R. 193. An order passed against servants without their masters being on the record is one made without jurisdiction and is liable to be set aside in revision by the High Court—5 L. W. 318.

In 32 Cal 257, however, it was held that where the Magistrate made the manager a party to the proceedings instead of the Zeminder, the course adopted by the Magistrate was a mere irregularity or at most an error of law, which did not vitiate the proceedings.

Receiver.—When a receiver is appointed by the Court, his possession is the possession of the Court. Such an officer cannot be described as a party interested in a dispute under section 145. Even if such officer can be so described, there will be no jurisdiction in the Magistrate to make any order on him under this section without the sanction of the Court appointing him—30 Cal. 593. In a dispute between the old and new tenants of an estate, the receiver who granted new leases to the new tenants and who himself is not in actual possession is not a proper party to the proceedings—9 M. L. T. 502.

Reversioner.—A person who is the next reversioner to the estate is not a person concerned in the dispute, and is not a necessary party because he has no right to present possession—24 All. 443.

Non joinder of parties.—Proceedings under this section would not be without jurisdiction, because the Magistrate on information before him has made as parties to such proceedings only those who are actually in dispute and who are likely by such dispute to cause a breach of the peace although in the course of the proceedings it is brought to his notice that some other person is interested in the subject matter of dispute. So also, proceedings under this section are not without jurisdiction, because some person claiming to have possession in some way of the lands or of portions of lands in dispute had not been made a party, when he was not one of the parties in the dispute so far as appeared from the information on which the Magistrate acted, and when such person does not appear and raise any objection. And further, proceedings under this section are not without jurisdiction merely because the parties that have been joined are concerned only with possession of portions of the land in dispute—30 Cal. 155 (F. B.).

But non joinder of persons concerned in a dispute, whose presence is essentially necessary for the purpose of proper decision of the case, involves a question of jurisdiction and the High Court has power to set aside an order made in a proceeding in which such persons are not made parties—28 Cal 446, 21 Cal 29, 24 Bom 527, 24 C W N 97

Addition of parties —Where parties are added after the initiation of the proceedings under this section, there is no necessity for a fresh proceeding in consequence of such addition, if the party added was concerned originally in the dispute which is the foundation of the proceedings. Up to the time of the beginning of the inquiry, parties may be added, if they are added after the inquiry is begun, it would amount to an irregularity. But it would not be necessary, in consequence, to initiate a fresh proceeding, but evidence previously taken ought, if the parties so added require it, to be again taken in their presence—30 Cal 155 F B (overruling 24 Cal 55), 20 C W N 978. Where the Magistrate added parties to the proceedings under sec 145 and issued fresh copies of the original proceedings, it was held that the procedure of the Magistrate was covered by the Full Bench ruling of 30 Cal 155 above—to C W N 1095

'His Court' —This means the Court of the Magistrate who issued the preliminary order. A preliminary order issued by a Magistrate directing the parties to appear before *another* Magistrate is illegal—2 P L T 186

"Within a time to be fixed" —When the Magistrate has taken any evidence in a case, he is not justified in refusing to proceed with it merely because the parties neglected to file a written statement on the day fixed for filing them. The Magistrate is wrong in saying that he has nothing before him to decide. He ought to proceed with the inquiry—11 W R 9

Granting time —Although a Magistrate has a discretion to refuse an application for time to file a written statement—8 C W N 642, still he ought to grant time to enable the party to file it. Therefore when on the day appointed for hearing a case under Sec 145, the parties although present filed no written statement nor produced any evidence, and the Magistrate refusing to grant time heard the parties and being unable to satisfy himself as to which of them was in possession, attached the property under Sec 146, it was held that the Magistrate had failed to exercise jurisdiction when he refused to grant time, and that he ought to have granted time to allow regular proceedings to be followed—12 C W N 896

Written statement —Its value —The statement made by a party in a written statement filed under this section ought to be proved like

any other statement, and therefore a Magistrate is not competent to pass an order in favour of a party merely on the strength of such a written statement—5 C W N 71 An order based on the written statement of one of the parties, and upon the failure of the other party to file it, without some evidence on the part of the party filing the statement in support of it, is without jurisdiction—8 C W N 642

Actual Possession —In the absence of any dispute as to the fact of actual possession of either the land or the crop, no proceeding under this section is allowed—4 M H C R APP 12 The possession contemplated by this section is the actual possession of the subject of dispute—9 C W N 887 The possession in regard to which the Magistrate's jurisdiction under this section should be exercised must be of a real and tangible character—23 W R 45

By actual possession is meant not merely bodily possession but the possession of a master by his servant, or the possession of a landlord by his immediate tenant, or the possession of the person who has the property in the land by the usufructuary—18 W R rr Whether the possession is on behalf of others or in one's own right is quite irrelevant. This section is concerned solely with the fact of actual physical possession whether lawful or unlawful, whether in contemplation of law enjoyed by the possessor in his own right or on behalf of others—3 L W 164=16 Cr L J 525

Possession of landlord by receiving rent from tenant is actual possession under this section—1884 P R 19, 25 W R. 18 The fact that tenants attorn to strangers by payments of rent to them, does not put an end to the tenancy so as to affect the possession of the landlord, and deprive him of his right to have recourse to this section in case of a likelihood of a breach of the peace and to have his possession of the right to collect rent maintained—15 Cal 527 A lambardar who is in management of a village for the benefit of the three co sharers of a village and who is himself a co sharer must be deemed to be in possession under this section—10 A W N 178

The possession contemplated by this section is absolute, continuing and not occasional possession Where the petitioners claim possession of a market stall only one day in the week, this section is inapplicable—49 Cal 871

Wrongful possession —Possession though obtained by wrongful means but complete at the time of inquiry is actual possession within the meaning of this section—1897 P R 5 So also possession obtained by fraud or trickery—Ratanlal 27

Origin of possession —A Magistrate ought to inquire into the question as to who is in actual possession of the property in dispute :

he has no concern as to how the party obtained possession, provided that the possession dates more than two months prior to the date of the preliminary order—11 Cal 365, 6 B H C R 30

Actual possession, what is not —Possession by tenant is not possession of landlord in cases where there is a dispute between the tenant and the landlord as to the fact of possession—2 Weir 107 Also, in case of dispute between two rival zemindars, constructive possession through intermediate holders (*e.g. ticcadars*) to whom the ryot pay rents, is not contemplated by this section—3 Cal 320

The possession contemplated by this section is real tangible possession, therefore, where a party claims *under a document* or agreement the right to do certain things over a large extent of territory, the performance of acts under such alleged right in one portion of the ground over which the right extends although it may be sufficient for the purpose of keeping alive that right so as to be an answer to a plea of limitation raised in a civil suit, is not in itself a sufficient possession on which the Magistrate's order under this section may be based for the purpose of forbidding in a distant locality acts necessarily not in conflict with such possession but at variance with the right—23 W R 45 So also the mere purchase at an execution sale without delivery of possession, does not amount to possession of the property purchased, and the rights of the purchaser will not be protected by this section—31 Mad 416

The possession given by Amin in butwara proceedings is simply one of ownership, and not of occupancy, and is not contemplated by this section—4 Cal 378, 3 C L R 94

A succession certificate only authorises the holder to collect the debts of the deceased and is no bar to the Magistrate maintaining another party in possession of the lands belonging to the deceased—18 W R 34

Symbolical possession —The *actual possession* of the lands in dispute is the only subject of inquiry An order for delivery of symbolical possession under the C P Code has no bearing on the magisterial inquiry—1915 M W N 55 18 Cr I J 718 (Cal) *Contra*—5 C L R 200, 14 Cal 169

Possession of forest land —In a dispute regarding forest land, the right to possession of which was exercised by cutting timber from time to time and removing the timber upon a certain price being paid for, it is necessary to inquire as to who was in undisturbed possession of the land in dispute by felling the trees and removing the same without objection, on the occasion immediately proceeding the time when the dispute arose, and whichever party be found to have been in possession

on that occasion should be presumed to have possession when the proceedings commenced—16 Cal 281.

Permissive possession —Possession that can be pleaded in a proceeding under this section must be possession based on a claim of right to possession. The possession of a person which is merely permissive cannot come within the purview of this section—10 C. W. N. 1088.

Encroachment —Where a person claims no easement or customary right, any intermittent encroachment on his part does not affect the title or possession of the superior landlord—32 Cal 287.

Joint possession —Section 145 contemplates a dispute between two parties, each of whom asserts the right to hold exclusive possession of the property as against the other (6 C. W. N. 883) and not a dispute between a party claiming to hold joint possession with another and the latter contesting such right. Such a dispute nearly always arises out of a claim to hold a specific share in the property, and this obviously is a matter which no Criminal Court can deal with—4 C. W. N. 426, 7 C. W. N. 118, 1902 P. R. 23, 10 C. W. N. 1088, 1 P. L. T. 594, 24 O. C. 167.

The object aimed at by the Legislature is the prevention of a breach of the peace. This can be secured by asking one of the parties to keep away from the property. But where both parties have been in joint possession and are still prepared to commit a breach of the peace by trying to oust one another, it will not be in the interests of the preventive remedy that both should be maintained in possession. It will certainly not help to maintain order and peace. That is the reason why Courts have declined to declare the joint possession of the contending parties—27 M. L. J. 169, 4 C. W. N. 426. Even in such cases, the Magistrate is not competent to put *one* of the parties in possession—17 Cr. L. J. 76 (Mad). Where it was found that the second party was in possession of the disputed land on behalf of the first party as also on behalf of himself, both parties being members of the same family, and the Magistrate declared the second party in possession, the order was held to be without jurisdiction—23 C. W. N. 1051.

Where the parties do not claim joint possession, but each party claims exclusive possession, this section is applicable—6 C. W. N. 883, 2 Lan. 372. And the fact that there may be a *joint title* to land does not prevent the application of this section—20 C. W. N. 518, 2 Lah. 372. The only question for the Magistrate is whether either party has actual possession and if he finds that one party has actual possession of a defined area, and the other party has not, he can make an order under this section, irrespective of the fact that the parties may have

Proof of service —Where one of the parties denies the service of order, the written return of the serving peon is not sufficient proof of the service. The Magistrate should examine the serving peon and allow him to be cross examined on this point—8 C W N. 719

Non service of personal notice —Failure to serve the notice upon the parties concerned is a mere irregularity—7 O C 334, and will not render the proceedings void, if the parties were present and no prejudice was caused—30 All 41, or if the parties appeared before the Magistrate who explained matters to them fully, and they evidently understood everything that was requisite—1917 P W R 26, or if the person did not question the order—30 Mad 548. But according to the Patna High Court non service of notice is a grave irregularity which vitiates the trial—19 Cr L J 71 (Pat), 19 Cr L J 112 (Pat)

Where the Magistrate did not serve any notice upon any person, nor did he affix a notice on the property in dispute, nor receive a written statement from either party, and passed the order in the absence of one party, the proceedings of the Magistrate were very irregular and were bad for want of jurisdiction—35 Cal 774, 1907 P R 7

If the proceedings are heard and order passed *ex parte* on account of absence of a party and that party afterwards appears and alleges non service of notice and applies for rehearing of the case, the Magistrate cannot reject the application but is bound to reopen the case after satisfying himself of the truth of such allegation—24 C W N 90

Omission of publication of notice —The provision as to the publication of the order in some conspicuous place near the property in dispute is directory and a matter of procedure only. Omission to publish the notice is not an illegality which deprives the Magistrate of his jurisdiction, and unless it be shewn that some one interested has been materially prejudiced by the omission, the High Court will not interfere—33 Cal 68 F B (overruling 8 C W N 590 and 9 C W N 909) 30 All 41.

Warrant to compel attendance of party —Under this section, the matter in issue is not the commission of an offence, but the settlement of a dispute, and it is entirely optional with the parties to attend or not, therefore the issue of a warrant to compel attendance of any party is illegal—5 C W N 71

Clause (4)—Inquiry —An inquiry as to possession is made not for the purpose of strengthening the possession of one party or the other, in the dispute between them, but because such an inquiry is necessary for the making of an order under subsection 6, declaring the party in possession to be entitled to retain it, until evicted therefrom in due course of law, and forbidding all disturbances until such eviction—30 Cal 112

When the requirements of clauses (1) and (3) are satisfied, the Magistrate is to take up the inquiry as provided in clause (4)—30 Cal 155

An order passed without inquiry is illegal—2 L. W. 1208=16 Cr. L. J. 289

The inquiry contemplated by this section is a personal inquiry. A Magistrate has no jurisdiction, even with the consent of parties, to make over an inquiry under this section to any person whatsoever. Subsection (4) makes it clear that the section contemplates only an inquiry by the person directed by the Statute to hold it, and by that person and no one else. This section read as a whole does not give the person charged with the inquiry the power to delegate the duties which have been vested in him to any other person to hold an inquiry or to ascertain facts which the law requires the Magistrate to do himself—2 P. L. J. 86. See also notes under "Inquiry by subordinate Magistrate" *infra*.

Procedure—It should be impressed upon Magistrates that the whole object of and only excuse for proceedings under Sec. 145 is the prevention of a breach of the peace supposed to be imminent, and that the procedure to be followed in disposing of such cases is that laid down in section 145, subsection (4) of the Code, which must be strictly observed. It should be the primary aim of the inquiring officer therefore to arrive at his decision with the utmost promptitude consistent with an adequate investigation into the dispute before him, and he should be specially careful not to permit the proceedings to assume the complexion of a civil suit, or in any way to countenance an endeavour on the part of either party to secure any advantage for the purposes of civil litigation..

'The trying Magistrate should be in a position to insist upon the taking up of the case on the date fixed for hearing, and it should not be necessary to grant adjournment after adjournment simply because the parties are not given due notice of the proceedings, or by reason of the proceedings themselves being inaccurate or incomplete. Once the case is commenced the hearing should be continued *de die in diem* until the Magistrate is in a position to arrive at a decision, but in doing so he must remember that the sole object of his inquiry is to determine if possible, the fact of actual possession, and that even in the case of an *ex parte* proceeding, there must be some recorded evidence to justify the order passed by him'—*Cal G. R. & C. O.* pp. 10, 11.

The sole procedure in an inquiry under section 145 by a Magistrate is as to who was in actual possession of the land in dispute, and a Magistrate should *not* deal with such proceeding as if it were a *civil* suit by framing several issues and trying them—35 Cal. 795.

If, therefore, the inquiry is to be treated as a criminal case, the question is whether the procedure of a summons case is to be observed. In 2 P L T. 330, 11 Cal 762 and 21 Cal 29, it is held that such a procedure is to be followed. But in another Calcutta case it has been remarked that in cases dealing with taking securities for keeping the peace or for good behaviour as also in cases of public nuisances, the Legislature has expressly provided that in some specified instances the procedure of a summons case, and in others the procedure for warrant cases shall be followed, but in this section the Legislature has deliberately omitted to specify the procedure. The conclusion, therefore, is that neither the procedure prescribed for a summons case nor that of a warrant case is to be followed, and such a protracted investigation would defeat the very object in view, *viz.*, an effective prevention of a breach of the peace. The proceedings are intended to be prompt and concluded without delay—32 Cal 1093. But from the Report of the Joint Committee cited below under this subsection and subsection (9), it appears that the Legislature intends the procedure to be that of a summons case.

Question of title—In a case under this section, the Magistrate has no jurisdiction to inquire into the rights of parties. What he has got to look to is the fact of possession only—7 C L J 369, 25 Bom 179. The whole scheme of Chapter VII contemplates an inquiry solely with reference to the fact of actual possession, irrespective of title—1914 M W N 798. This section contemplates a determination of the question of possession without reference to the merits of the respective claims of the disputing parties to a right to possess the subject of dispute—32 Cal 1093, 1917 P. W. R. 28. The Court is to make the inquiry as to possession without any reference to the merits of the claims of any party to a right to possession—2 Weir 98, 7 W R 26. Where a Magistrate in deciding a case under this section refers to the claim of any of the parties to a right to possess the land in dispute, he exceeds his jurisdiction and his order will be set aside—6 C L J 182, 32 Cal 602. It is a misconception of the aim and the object of law to come up under this section to the Court with questions of title to possession of land which can only be settled by Civil Courts—17 W R 3. This section does not contemplate to determine dispute regarding the actual rights of parties over the immoveable property—27 Cal 913.

The Magistrate may, if necessary, take and consider evidence of title to enable him to decide the question of actual possession, but proof of title is not proof of actual possession—34 Mad 138, 6 W R 61. Where no sufficient evidence of possession is produced by the parties, the Magistrate may use evidence of title merely to guide and assist his

mind in coming to a decision upon the question of possession—7 Cal 46, 14 Cal 169, 35 C L J 156, 1 P L T 387, 1922 M W N 12

But if the Magistrate finds that the evidence of possession on both sides is equally unreliable, he cannot rely on the presumption that possession follows title, in such a case he should act under sec 146. If however he finds the evidence on both sides reliable and equally balanced, and he is unable to conclude from such evidence which party is in possession then he is entitled to corroborate the evidence of possession given by one side by the presumption as to possession arising from the title which he finds in that side—26 C W N 1000. But he must use the evidence of title for this limited purpose. If instead of proceeding to decide as to the actual possession he virtually puts aside the consideration of this question and determines the question of title alone, he is doing that which the law has forbidden him to do—7 Cal 46. And a decision under this section ought to be based upon evidence of possession and not of title—*Ibid*. Where evidence of possession is available, a Magistrate acts clearly without jurisdiction in deciding the claim of the parties to possession on documentary evidence of title—18 C W N 700, 38 M L J 73.

Perusal of statements—The Magistrate shall peruse the written statements of both parties. An *ex parte* order made on the written statement of one of the parties and upon the failure of the other party to file one, without some evidence on the part of the party filing the written statement in support of it, is without jurisdiction—8 C W N 642, 12 C W N 771. And the Magistrate fails to exercise jurisdiction if he refuses to grant further time to the parties to file written statements—12 C W N 896. When the Magistrate has taken any evidence in a case, he is not justified in refusing to proceed with the case merely because the parties neglected to file written statements on the day fixed for filing them—11 W R 9.

'Hear the parties'—These words mean that the Magistrate must hear the arguments at the conclusion of the evidence on both sides, just as it is the procedure prescribed in a summons trial, and the refusal of the Magistrate to hear the arguments of the parties vitiates the final order—19 Cr L J 741=5 P L W 103, 5 P L J 246.

Receiving evidence—The Magistrate is bound to examine the parties and receive evidence—17 Bom L R 382. An order under this section without taking evidence is invalid and must be set aside—2 A W N 181, 6 C W N 923, 11 A L J 586, 8 C W N 719, 1916 P R 22, 1916 P R 4, 43 M L J 716, 2 L W 1208, 17 Cr L J 217 (Mad). A decision of a Magistrate based upon mere local enquiry, and discarding the evidence altogether is bad as one made without jurisdiction—

10 C W N 181, 46 Cal 1056, 38 M L J 73, 25 C W N, 1007, 16 W R 13 An order passed by a Magistrate on the basis of his own knowledge without recording any evidence, and relying solely on the evidence in another case is invalid—25 O C 148 So also an order passed merely on a consideration of the written statements and without taking any evidence is invalid and must be set aside—34 Cal 840, 8 C W N 642 Similarly, an order under this section without giving either party an opportunity of adducing oral evidence as to possession is illegal and liable to be set aside—21 C W N 928 The Magistrate must consider both oral and documentary evidence in the case—1 P L T 291 2 P L T 333

It is not open to a Magistrate to refuse the evidence tendered to him—29 Mad 561 The Magistrate's act in preventing the objector from production of evidence to prove his case constitutes such a grave irregularity as to amount to abuse of jurisdiction and the Magistrate's order is in consequence open to revision—1902 P R 23 The Magistrate is bound to grant adjournment for the production of important evidence if he refuses to do so, his order is liable to be set aside—25 C W N 602 If the evidence rejected is a material document affecting possession of a party, its rejection might furnish a good ground of grievance to that party—20 Cr L J 234 (Pat)

The words '*receive all such evidence as may be produced*' have been substituted for the words '*receive the evidence produced*'. This shows that the Magistrate is now bound to receive all evidence produced by the parties and has no discretion to refuse any evidence. 'In order to meet certain difficulties which have arisen in connection with the words '*receive the evidence produced by them*' in section 145(4) we have made an amendment adopting the phraseology of section 244 (1) —*Report of the Joint Committee (1972)*

Examination of witnesses —The Magistrate is bound to examine any witnesses tendered in support of the respective claims to possession of the land in dispute—6 M H C R App 4 9 W R 64 An order passed without examining the witnesses is without jurisdiction—17 Cr L J 217 (Mad), 12 C W N 771

So also, an order passed on the evidence of a person who was not a witness of any of the parties is bad—8 C W N 719, 1916 P R 4

Under the old law, a mere refusal by the Magistrate to examine a particular witness in a proceeding under this section was not necessarily a ground for interference by the High Court—30 Cal 508 A Magistrate was not bound to examine all the witnesses adduced by the parties, but could limit the number for good and sufficient reasons. He had a discretion with the matter of examining witnesses—3 C L J 478

(explaining 31 Cal 585); 16 Cal 513. The Court had undoubted jurisdiction to curtail the number of *unnecessary* witnesses upon the ground that their examination will delay and possibly defeat the ends of justice—2 P. L. T. 330. Therefore where a Magistrate after examining ten of the witnesses produced on behalf of one of the parties, refused to examine any further witnesses on the ground that the evidence sought to be adduced was worthless, it was held that the Magistrate had not acted without jurisdiction—24 All. 315. But this discretion should be exercised with due care and caution and with careful regard to the circumstances of each particular case—3 C. L. J. 478, and the Magistrates should always be chary of taking upon themselves the duty of deciding as to which witnesses should be examined—28 M. L. J. 134.

The present Amendment of this subsection, however, makes it obligatory on the Magistrate to examine *all* the witnesses produced by the parties.

Summons to witnesses —See sub section (9) and notes thereunder.

Admission by party —If one of the parties admits that the other is in possession, the Judge is not bound to take any evidence—9 M. L. T. 91. Although it is necessary ordinarily to record evidence in a case under this section before passing final orders, it cannot be said that it is indispensable to do so when the case is completely given up by the opposite party. An admission by the Mukhtear that his client had no actual possession is sufficient for that purpose—7 C. W. N. 351.

Withdrawal of proceedings —Where after proceedings under this section have been properly instituted, the first party examines some witnesses and then represents to the Court that he shall conduct the case in the Civil Court and gives an undertaking not to enter upon the said land until the matter shall have been settled by the Civil Court, whereupon the Magistrate passes an order reciting the terms of the petition and declaring the second party to be in possession, the omission by the Magistrate to take evidence on behalf of the second party or to record a formal finding as to possession does not vitiate the order—18 Cr. L. J. 1024 (Cal).

Inquiry by Subordinate Magistrate —The inquiry contemplated by this section is a personal inquiry by the Magistrate who makes the order. Therefore, an order under this section based upon the report of a Subordinate Magistrate made after inquiry by such Magistrate is illegal—4 M. H. C. R. App. 20. Though Sec. 148 enables a Magistrate acting under this section to depote a Subordinate Magistrate to make a local investigation, he ought not to depute to such Subordinate Magistrate the whole investigation under this section, but on the receipt of the report of such Magistrate should himself take written statements

from the parties and receive the evidence produced by them and conclude the investigation under this section—2 Weir 118

If a Magistrate omits to take evidence as required by clause (4) but refers it to a subordinate Magistrate to report thereon, his order based on such evidence alone is made without jurisdiction and must be set aside—31 Mad 82 But in a later Madras case it has been held that the order based on the report of a Sub Magistrate is not without jurisdiction The essential requisite to give jurisdiction to a Magistrate is that he must be satisfied about the existence of a dispute likely to cause a breach of the peace His subsequent action is a matter of procedure and not of jurisdiction—37 M L J 589 (disseoting from 31 Mad 82)

Evidence recorded by predecessor —Since a proceeding under this section is an inquiry within the meaning of Sec 4 (k), a Magistrate may act on evidence taken by his predecessor by virtue of sec 350 The decision in 23 W R 62 is no longer good law

Reference to arbitrators —This section requires the Magistrate himself to receive the evidence adduced by the parties, and on a consideration thereof to come to a decision The procedure laid down by this section does not contemplate that the question as to who is in actual possession should be delegated, even by consent of parties, to arbitrators—32 Cal 552 2 P L J 86 25 C W N 719 But where the parties themselves agreed that the question of possession should be decided by an arbitrator, and the matter was thereupon referred to arbitration, the Magistrate was bound to take the finding of fact by the arbitrators into consideration—7 C W N 461 So also, where the dispute was referred to arbitration by consent of parties both of whom accepted the award that followed, it was not open to the Magistrate to insist on the production of evidence—3 P L J 248 and he would be competent to cancel his preliminary order under sub section (5) of this section—25 C W N 719

Where the parties themselves applied that the matter should be referred to arbitration, and the Magistrate made an order in terms of the award, the parties were not entitled afterwards to object to the course—6 C W N cix

Decision as to possession —An order under this section without deciding the question as to who was in actual possession of the land in dispute, is one made entirely without jurisdiction and consequently void—35 Cal 795, 1922 M W N 689

Where it is difficult for a Magistrate trying a case under this section to come to a conclusion as to the fact of possession, the wise and proper course to be adopted is to pass an order under Sec 146 Where a Magistrate in such a case passes an order under Sec 145,

the High Court in revision has the power to make the order which the lower Court ought to have made, and to alter the order under Sec 145 into one under Sec 146 of the Code—14 Cal 361, 22 Cal 297

Possession at the date of the order —The question of possession has to be determined with reference to a specified point of time, viz, the date of the initial order, or in the case of forcible dispossession, a date within two months next preceding such order—32 Cal 1093. The rulings in 11 Cal 365, 12 Cal 521, 52 Cal 539, 16 Cal 581, 20 W R 51, 15 Bom 152, 18 Mad 41, 13 All 362 are no longer good law.

A Magistrate should find as to who was in possession at the date of the order, not at any date anterior to that, although previous possession may be a guide to his finding as to peaceful and actual possession on the date of the order—16 Cr L J 239 (Mad)

Where the Magistrate found one party to have been in possession a few days before the date of the preliminary order and confirmed his possession without finding who was in possession on the date of the preliminary order itself, but the interval between the two dates was very short, (viz, 5 days only) and there was nothing on the record to show that there was any change of possession in that short interval, and the party confirmed in possession had a decree of Civil Court declaring him entitled to possession, *held* that the order of the Magistrate was valid—42 M L J. 147. But, where the Magistrate declared possession in favour of the opposite party as evidenced by certain documents of title relating to a period as old as 10 years prior to the proceeding, without taking further evidence, oral or documentary, to see whether that possession continued up to the date of proceeding, the High Court set aside the order as made without jurisdiction, being contrary to the provisions of this sub section—18 C W N. 700

Land under water —Where the Magistrate made the final order in favour of one party, finding that as there could not be any act of peaceful possession within two months of the date of the proceeding owing to the land being under water the possession in the current year was to be presumed in favour of the man who was in possession during the previous years, it was held that the order was in direct contravention of this section, and the Magistrate should have passed an order under Sec 146—20 C W N. 1014

Forcible possession —*Peaceful possession* —The Magistrate's duty is to find peaceful possession. Ouster of a person lawfully in possession by a trespasser does not confer on the latter rights which can be recognised under this section. The Magistrate must look to the possession which may be termed peaceful. He must go back to the

time when the present dispute originated and not to the result of the dispute itself—4 Cal 417 The recent occupation of a trespasser is not a possession which a Magistrate can direct the party to retain under this section The possession is still with the person ousted by the trespasser, and an order directing him to have possession and the trespasser to be dispossessed is the proper order to be made—1876 P R 8 Where it appeared that one of the parties within two months prior to the proceedings obtained sanction from the Municipality and proceeded to dig a tank on the land in dispute to the exclusion of another party who was then found to be in possession, it was held that it was forcible and wrongful dispossession within the meaning of this section and possession must be deemed to be in the party dispossessed—20 C W. N 978

If a person has been turned out of possession and *submits to the ouster*, and the other party, whether rightfully or wrongfully, is in peaceful possession, a Magistrate will not go behind the period when possession may be found to have become peaceable—t C L R 136 For the point for inquiry under this section is not whether any of the claimants has taken possession of the subject of dispute by force, but whether the struggle for it has ceased leaving it in the hands of one of them If the struggle has ceased, the party in whose hand it remains is in actual possession on which the Magistrate is bound to recognise under this section—1897 P R 5 If, however, the struggle for possession is still proceeding between the party who has taken forcible possession and the rightful owner, or if neither party can show its complete control over the subject at the time when the proceedings are taken, neither party is to be regarded as in possession, and the Magistrate is to take action under section 146—Ibid

It is not necessary that actual force or violence should have been used to some person before a dispossession can be said to be 'forcible', when the dispossession of a person is effected by a *show* of criminal force, that person is said to be forcibly dispossessed—25 C W N 601

Date of forcible possession —It is not sufficient for a Magistrate to come to a general finding that certain fields are in the possession of one party and certain others in the possession of the other, and that the latter had taken wrongful and forcible possession The *date* of such forcible possession must be determined and unless there is a finding that the forcible possession occurred in the case of all the fields at the same time, there must be a finding as to the date of the possession with regard to each field separately—1917 P W R 28

Attachment.—An order for attachment under proviso to clause (4) would remain in force only pending the Magistrate's decision, and not

until a decree or order of the Civil Court is obtained—8 S. L. R. 207

Movable property.—This section does not authorise the Magistrate to attach moveables—Ratanlal 891, 27 M. L. T. 234; 24 O. C. 167; 20 A. L. J. 906

Postponement of proceedings.—A Magistrate has no jurisdiction to pass an order postponing *sine die* a proceeding under this section, at the same time retaining under attachment the property covered by the proceeding, on grounds extraneous to the proceeding—13 C. W. N. 104

Appointment of receiver.—A Magistrate cannot appoint a receiver under proviso to clause (4) of this section even before the commencement of the inquiry. He can do so only under Sec. 146 and after the conclusion of the inquiry—1910 M. W. N. 821, 3 P. L. J. 147. Even if a Magistrate appoints a receiver under this section, such receiver will only be an agent or servant of the Magistrate acting under his order. The right to attach carries with it the right to take the necessary steps for custody and management of the property and the Magistrate may appoint a receiver for that purpose—13 Cr. L. J. 295 (Mad), but the power of such receiver will not be the same as that of a receiver appointed under sec. 146 *infra*. His duty will be simply to take and keep possession of the properties attached and make an inventory thereof—27 M. L. T. 234

Joint Inquiry.—(1) *One dispute as to several plots*.—When the dispute is *one*, the fact that it embraces several distinct parcels of land is not sufficient to necessitate an independent proceeding in respect of each—30 Cal. 155 (F. B.). Where a dispute concerning the possession of a number of different plots of land was covered by the same state of circumstances, it was held that the Magistrate was competent to include all the plots in one proceeding, and to rely upon the evidence adduced in respect of all of them together—10 C. L. R. 523. Although it may be desirable under such circumstances to deal with each dispute relating to each of several plots separately, it is impossible to extend to such proceedings the strict rule of procedure observed in civil actions—6 C. W. N. 206. To draw up one proceeding with respect to several plots of land claimed to be in the possession of different persons would not be bad, if it was shown that none of the parties had been precluded from giving any evidence and no party was prejudiced by the Magistrate not taking separate proceedings—5 C. W. N. 544. Such a joint trial would be at most an irregularity and would not vitiate the inquiry—5 C. W. N. 710, 30 Cal. 155

(2) *Different disputes as to different subjects*.—Where the parties are found to be in possession of different and separate pieces of land, *e.g.* when the dispute is alleged to exist in 230 villages and each village

stands on its own footing, the Magistrate does not exercise proper jurisdiction if he clubs together 230 subjects of dispute and treats them as one. The Magistrate should decide which party is in possession of this or that village, instead of arbitrarily finding that one party was in possession of all the villages—29 Mad 561, 1 S L R 25

Different Claims —In a dispute regarding possession of 708 bighas of land belonging to a Zemindari, the parties to the dispute being persons interested as tenants under the Zemindar and persons claiming under the same Zemindar to be interested in various portions of the land as their maurasi jote in different quantities and under interests acquired at different times, the Magistrate tried the case together and passed an order in favour of the former directing that they as a body should remain in possession until evicted therefrom by order of Civil Court, it was held that the procedure adopted by the Magistrate was prejudicial to the maurasi tenants and that the order was open to the objection that it would render necessary the making as defendants in the civil suit of a multitude of persons who were by terms of the order held to be in possession. The proceedings were set aside—15 Cal 31

(4) *Where parties in all cases are not the same* —Where parties in several cases under sec 145 are not the same, the Magistrate is not competent to try all the cases together although the parties consent to the adoption of such a procedure. Evidence already taken in one case may be accepted in the other cases but the cases must be tried separately—4 C W N 748

There should be separate and full inquiry in each case —Where two cases are enquired together, the Magistrate must come to a separate finding after full inquiry into each case and the decision of one case should not be applied in coming to a decision in respect of the other. Where two investigations were before the Magistrate who after conducting a regular inquiry in the first case and coming to a proper decision remarked in the other case that because the lands were adjacent he had taken the evidence in the two cases together and found it unnecessary to continue the inquiry further, it was held that the parties in the second case were entitled to a full inquiry—8 W R 63

Subsection (5)—Addition of parties —Subsection (5) does not enable a Magistrate to add parties to the proceeding. It merely enables a stranger to come in and show that no such dispute likely to cause a breach of the peace concerning any land etc existed. He does not become nor can he thereby be made a party to the dispute which, he seeks to show, has never existed—3 C W N 329. A third person is allowed to come in under clause (5) only for the purpose of showing that no dispute likely to cause a breach of the peace really existed or exists

but it is not clear whether such person can be made a party to the proceedings—5 C W N 900

Where a person applies to be made a party on the ground that he is interested in the land in dispute as a tenant of a part of the property in dispute, and there is nothing to show that that is not the case, he should be allowed to show under clause (5) that there is no dispute—37 Cal 295

But no order can be passed under sub section (6) in favour of such person; and the Magistrate has no jurisdiction to declare any land to be in the possession of such person—19 Cr L J 653 (Cal), 25 C W N 214

For further notes on addition of parties, see under clause 1

Cancellation of preliminary order—A Magistrate can cancel his preliminary order only on facts being brought to his notice which are sufficient to satisfy him that no dispute likely to cause a breach of the peace exists and therefore the cancellation of proceedings merely on the ground that the Magistrate thinks that the letter addressed to him by one of the parties contains an admission that the other party was in actual possession of the land in dispute is without jurisdiction and should be set aside—13 C W N 125 The Magistrate can cancel a preliminary order only when the parties are in a position to give *positive* evidence that there is no likelihood of a breach of the peace. The mere absence of a finding by the Magistrate in respect of a likelihood of a breach of the peace is not sufficient—25 C W N 215 The information that there is no likelihood of a breach of the peace need not be confined to what the parties give under sub section 5. If the Magistrate is satisfied, whatever the source of his information may be, that the likelihood of a breach of peace does not exist, he can cancel the order passed under sub section (1) and stay proceedings—30 Cal 112 4 L W. 57= 17 Cr L J 138, 1921 P W R 6 2 Lah 364

When a Magistrate cancels an order under this sub section, he has no jurisdiction to allow one of the parties to reap the crops to the exclusion of the other—3 C L J 573 When the Magistrate has cancelled his preliminary order (attaching the property) and released the property from attachment, he has no jurisdiction to direct the delivery of the collected produce to one of the contending parties. The proper course under these circumstances is to retain the produce until one of the parties obtains an order of a Civil Court. If the property is of a perishable nature, or difficult to keep in safe custody, it may be sold and the proceeds kept in deposit—16 Cr. L J 104 (Mad)

Cancellation of order made by predecessor—A Magistrate has jurisdiction to cancel the order of his predecessor—2 Weir 108

Effect of cancellation :—An order striking off proceedings under this section does not amount to an adjudication of the question of possession for the purposes of sub section (6)—30 Cal 112

Fresh proceedings —When proceedings under this section are struck off on the ground that there is no immediate apprehension of a breach of the peace, the Magistrate has no jurisdiction to *revive* the proceedings. He can only start fresh proceedings upon fresh materials which must be specific relating to the lands in dispute. A general state of affairs in the locality is insufficient—2 P L T 267. If it is intended to take fresh proceedings upon new materials, it is necessary for the Magistrate to record such materials in his order renewing the proceedings—6 C W N 923

Clause (6)—Final Order —

Form of order —See Sch V, Form no 22

Signature —A Magistrate should sign his name in full to a judicial order under this section and should also note his official position—12 C W N 771

Order by another Magistrate on transfer —The jurisdiction to make a final order under this section is not personal to the Magistrate who initiates the proceeding, and a District Magistrate may of his own motion transfer a case under this chapter to another Magistrate of the first class subordinate to him—10 C. W N 1095, 22 Cal 898

Or should be treated as pending' —'We think that this subsection should apply not only to the case of a party in actual possession but also to one who is to be treated as being in possession under the proviso to sub section (4) and we have amended sub section (6) in this sense'—*Report of the Select Committee of 1916*

'May restore to possession' etc —'Power has been given to restore to possession a party forcibly and wrongfully dispossessed—*Statement of Objects and Reasons* (1914) "We think that this is a logical carrying out of the provision contained in the first proviso to subsection 4'—*Report of the Select Committee of 1916*

Prior to this amendment, it has been held in several cases that the only order which a magistrate is competent to pass under this section is one declaring one of the parties to be entitled to possession, but he has no jurisdiction *to deliver possession or to oust one person and place another in possession of the property*—37 All 654, 27 All 300, 14 A L J. 146, 12 C W. N 696, 14 C. W N 78, 4 Cal 339. These cases are no longer of any authority

Order in respect of portions of the subject of dispute —Where in a proceeding under sec 145 in respect of a dispute concerning some land, the Magistrate finds that one party has been in possession of

a portion of the land in dispute, and the other party in possession of the rest, and the possession of the one is not likely to interfere with the enjoyment of the possession of the remaining portion by the other, the Magistrate can, in the exercise of jurisdiction vested in him under this section, maintain both parties in possession of their respective portions, and an order of attachment under sec 146 is unnecessary—11 C W N 743 Thus where the Magistrate finds that each party was in possession of separate rooms in the same building, the Magistrate is competent to pass an order that the separate possession of each party should continue—2 Weir 108 Where the component parts of the subject matter of dispute are quite divisible from each other, it is quite possible to make an order confirming the possession of one of the parties in regard to those parts and it is not competent for the Magistrate to make an order for attachment of the whole property—5 C W N. 710 If however the subject matter of dispute is one and indivisible, the proper order to make is an order of attachment under sec 146 Thus in a proceeding under sec 145 regarding dispute between two parties in respect of certain collieries, it appeared that the first party were in possession of the building which contained the office where the business of the collieries was conducted and the cashbooks and the papers of the business were kept, and the second party were in possession of the pits, wharves and tramway of the colliery The Magistrate passed an order in favour of the second party considering that party to be in actual possession It was held that as the subject matter of dispute was indivisible, and as the second party was not in possession of the whole of the colliery, the order of the Magistrate was bad, since its effect would be to place the second party in possession of that portion (viz the building) which was in the possession of the first party The proper order of the Magistrate was one under sec 146 attaching the whole property—22 Cal 297 Similarly, where there was a dispute concerning certain immoveable and moveable property, and the Magistrate took proceedings under this section and give possession of the house to one party, except two rooms in which the Magistrate locked up the moveables until the rights of the parties in respect of the moveables were determined by the Civil Court, *held* that the order was illegal—42 All 214

Effect of order —Title —Burden of proof in subsequent suit— Although a Magistrate's order under this section confers no title, the fact of possession remains and the person in possession can only be evicted by a person who can prove a better right to possession himself—4 Bom L R. 167, 29 Cal 187 (P C) The order throws upon the person contending its validity the burden of proving his title The onus is not upon the person in possession to show that the judgment

in his favour is right, it is for his opponent to show that it is wrong, and where and why it is wrong—4 Bom L R 167 The onus is on the plaintiff to show that the person in possession under the order of the Magistrate has no right to possession—23 C W N 593

Appointment of Receiver by Civil Court —The fact that there is an order under this section does not bar the jurisdiction of the Civil Court to appoint a Receiver under sec 503 of the C P Code 1882 (=O XL of the present Code of 1908)—22 All 214

Mamlatdar's order as to possession —An order under this section does not take away the jurisdiction of the Mamlatdar or any other Civil Court to decide who was in actual possession before the date of the order—26 Bom 353

Suit under Sec 9 Specific Relief Act —An unsuccessful party in a proceeding under this section cannot be said to have been *dispossessed*, and therefore he has no cause of action to bring a suit under sec 9 of the Specific Relief Act—7 C L J 547 But where the plaintiff was forcibly dispossessed by the defendant before the institution of proceedings under this section, and the trespasser's possession was maintained by the Magistrate, the plaintiff is entitled to sue under sec 9 Specific Relief Act—30 All 331

Evidentiary value —Orders of Magistrates under this section are admissible in evidence to show the fact that such orders were made. They are also evidence of the following facts all of which appear from the orders themselves, viz, who the parties in dispute were, what the land in dispute was, and who was declared entitled to retain possession. For this purpose and to this extent such orders are admissible in evidence for and against every one when the fact of possession at the date of order has to be ascertained. If the order refers to a map, that map is admissible in evidence to render the order intelligible—29 Cal 187 (P C)

Orders which cannot be made under this section —Where possession is found to be in one party, the Magistrate has no jurisdiction to grant to the other party *permission to cultivate* the lands in dispute pending any necessary action that might be subsequently brought—18 W R 27 A Magistrate has no jurisdiction to order a *division of crops* on the land between the parties—8 C L J 242 Nor can he order that a person shall be maintained in possession until he has reaped the crops and then he shall give way to another—1 C L R 136 An order to *hand over profits* arising out of the land attached under this section to a party cannot be justified either by the provisions of this section or by any other section of the Code—7 C L J 369, nor can the Magistrate direct the produce to be delivered to one of the parties after he releases the

property from A to B—17 C. L. J. 104 (Mad). Where a Magistrate found that the disputed land was in possession of the second party, but directed that two gateways on the disputed land should remain intact and only the remaining sides of the disputed land should be in possession of the second party. Held that there was no error in this direction which gave the Magistrate power to pass an order of that kind—17 C. W. N. 721.

In a dispute as to the right to cut a tree, the Magistrate cannot direct that a passage should be left for the purpose of carrying in a wall which was being built by the second party—31 L. J. 316.

The Magistrate cannot pass an order of awarding without declaring the possession of the parties—2 P. L. T. 27.

A Magistrate is not competent to pass an order directing the method by which the possession is to be executed or the agency by which the person in possession is to execute the process—51 L. J. 915. He cannot pass an order to the effect that one of several joint owners should not use the land in such a manner as to cause annoyance to another—2 C. L. R. 62.

Order in the absence of tenants.—The disputed land consisted of several plots of land all held by tenants on a yearly rent of half the produce. The parties to the proceedings were the *dikarsidar* and the *fauzidar*, the dispute between whom was as to the right to collect rent. It appeared that as regards some of the plots there was a dispute as to what tenants were in possession. It was held that as regards the plots about which there was a dispute as to what tenants held the lands, the Magistrate should not have passed any order in those proceedings in the absence of the tenants, because they might be very seriously prejudiced by an order in favour of one or other of the parties to these proceedings—19 C. W. N. 959.

Supplementary order without notice.—Proceedings under this section were drawn up in respect of certain premises consisting of a *da'm*, hotel and a privy, and the Magistrate made his final order with regard to the first two. Subsequently, the omission in respect of the privy being brought to his notice by one of the parties, the Magistrate declared that party's possession of it without notice to the other party. It was held that the order in respect of the privy should not have been made without hearing the other party—22 C. W. N. 552.

Order in respect of land not covered by proceedings.—In a proceeding under this section, the Magistrate is bound to ascertain and define the land in dispute, and he has no jurisdiction to determine under that proceeding a dispute regarding lands which are not covered by the proceeding—7 C. W. N. 558.

A Magistrate would also be exceeding his jurisdiction if his final order covers plots of land not included in the preliminary order under sub sec (1)—11 C W N xliii

Alteration of proceedings by succeeding Magistrate —Where a proceeding under this section was taken by a Magistrate, and subsequently upon the same material, this proceeding was revised by a succeeding Magistrate who altered the dispute as to possession of land into a dispute as to collection of rent, it was held that the recording of the subsequent order was an abuse of jurisdiction especially when the report on which it rested did not give any information as to any dispute relating to collection of rent—27 Cal 892

Persons bound by the order —Judicial proceedings cannot bind a person who is not a party to them—3 C W N 329 An order under this section is binding only on the *actual parties* to the proceedings Where an order was made between A on the one side and B and his three tenants on the other, the subsequent tenants of B would not be bound by such order and would not be punished for disobeying such order—3 B L R A C 13 Where there is no evidence to show that an order under this section was *directed* to the accused, he cannot be convicted under section 188 I P C for disobedience of such order—7 C L R 291

But in 11 Bom L R 377, it has been held that the parties whom the Magistrate has to deal with are not merely the actual parties to but all persons who may be concerned in the dispute the object being to prevent a breach of the peace Therefore it is not the actual parties but *all parties who may have notice* of the proceedings that are bound by the order

An order under this section binds not only the actual parties but *representatives* also It is binding on a purchaser from the person against whom it was made and with knowledge of such order—13 Cal 275 It is binding upon all persons who may claim the property through the parties to the proceedings under a title derived subsequent to the order—23 Cal 731

But a person who was merely examined as a *witness* in the proceeding is not a party bound by an order under this section—18 Mid 51

Duration of the order —An order of the Magistrate is meant to be a *temporary* order and is to be in operation until one or other of the parties applies for and obtains a determination of his rights in a Civil Court—7 C W N 558, 29 Cal 208 It is intended to control only the period up to the time when the Civil Court takes *seisin* of the matter and passes such order as may be necessary for the protection of property—22 All 214 This section does not empower a Magistrate to make an

order *permanently* settling the difference of the parties—*Mad High Court Pro*, 23—6—1883

Subsection (7)—Continuation of proceedings —Before the amendment of 1923, this subsection stood as follows —

"Proceedings under this section shall not abate by reason only of the death of any of the parties thereto"

The subsection has now been expanded 'The Magistrate has been authorised, on the death of a party to make his legal representative a party to the proceedings and if necessary, to decide who such legal representative is'—*Statement of Objects and Reasons* (1914)

This clause supersedes the decision in 21 Cal 404, where it was held that a son could not be made a party in place of his deceased father

Where an order was made in favour of two persons, the death of one of those persons before the termination of proceedings is not a good ground for setting aside the order, though the better course would be to postpone the proceedings and make the representative of the deceased a party—2 C L R 364

The words "may cause" show that the Magistrate is not bound to continue the proceedings on the death of a party The provision in clause (7) is intended to keep alive the jurisdiction of the Court where the danger to the peace still exists in spite of the death of any party to the proceedings If however the danger has disappeared, the Magistrate has jurisdiction to discontinue the proceedings—4 L W 57=17 Cr L J 138

Death of Petitioner before High Court —The death of the petitioner (for revision of an order of a District Magistrate) during the pendency of the application for revision in the High Court causes the application to abate The sub section only applies to proceedings before a *Magistrate*—1919 P R 23, 4 L W 440=17 Cr L J 389

Sub section (8) —"The Magistrate has been empowered to pass necessary orders for the custody or sale of the property in dispute which is subject to speedy and natural decay"—*Statement of Objects and Reasons* (1914)

Sub section (9) —"We have added this sub section on the lines of section 244 (2)"—*Report of the Joint Committee* (1922) Even prior to this amendment, there has been a large number of case laws empowering the Magistrate to issue summons to witnesses, which are given below

Summons to witnesses —If the parties cannot procure the attendance of witnesses, it is the Magistrate's duty to issue summonses for their attendance, even though the Code contains no provision for the issue of summonses in this case—18 W R 64, 21 Cal 29 When an application for the issue of summonses to witnesses is made at a proper

time, the Magistrate should not arbitrarily refuse his assistance merely on the ground that the number of witnesses mentioned is large—11 Cal 762, or on the ground that the application for the issue of summonses was vexatious—18 C W N 94 This section enjoins the Magistrate to receive the evidence produced by the parties and to take such further evidence as he thinks necessary But this does not mean that the parties shall produce their own evidence, nor does it absolve the Magistrate from the duty of assisting the parties in procuring the attendance of material witnesses when it is shewn that their attendance cannot be enforced without such assistance—30 Cal 508 But it is not *obligatory* on a Magistrate to assist the parties in producing their witnesses, and they cannot claim as a matter of right that process should be issued by the Court to enable them to bring forward their evidence—32 Cal 1093, 38 Cal 24, 3 P L T 433 A Magistrate is not bound to exhaust the processes of the Court in order to enforce the attendance of witnesses that do not appear or cannot be found—17 C W N 144 Cf the words '*may* if he thinks fit' in this sub section

Sub section (10) —Power to proceed under sec 107 —In 35 Cal 177, it has been held that the word '*shall*' in subsection 1 (he *shall* make an order in writing' etc) is mandatory, and therefore where there is a *bona fide* dispute likely to cause a breach of the peace, the Magistrate is bound to proceed under this section, and has no discretion to act under sec 107 It was proposed by the Amending Bill of 1914 to substitute the word '*may*' for '*shall*', so as to give the Magistrate a discretion to proceed either under Sec 107 or under Sec 145 The Select Committee of 1916, instead of making the verbal alteration, added the present sub section

There may be cases in which it would be necessary to bind parties over under section 107, in order to prevent a breach of the peace even though proceedings under sec 145 had been taken An order under section 145 is no bar to the passing of an order under sec 107 of the Code—36 Mad 315, 24 O C 21

Miscellaneous —

Effect of prior decrees on a proceeding under this section — Where there is a decree of the Civil Court for possession in respect of the disputed land, the duty of a Criminal Court proceeding under this section is to find which party held such Civil Court decree and then to maintain that party in possession—5 C W N 563, 20 C W N. 796, 42 M L J 147, 3 P L T 335, 4 P L T. 248 6 Cal 835, 29 Cal 208; 6 W R 10, 16 W R 24. It is the duty of the Magistrate to maintain any order which has been passed by the Civil Court, and therefore to take proceedings which *must necessarily* have the effect of

modifying or cancelling such order is to assume a jurisdiction that the law does not contemplate—26 Cal 625 ; 24 Bom 527 ; 49 Cal 177 ; 37 C. L. J. 256 , 2 A. L. J. 274 ; 17 A. L. J. 434 ; 5 P. L. J. 104. It is not for the Magistrate to question the validity of a decree of a Civil Court—27 C. W. N. 267

Thus, where symbolical possession of the property of the judgment-debtor has been, rightly or wrongly, given by the proper officer of the Civil Court to the auction purchaser, and such possession has not been abandoned by the purchaser, a Magistrate is bound to maintain such possession and has no power to direct that the judgment debtor is in actual possession and shall be so maintained until evicted by a Civil Court—5 C. L. R. 200 , 4 P. L. T. 248. The fact that the Civil Court had no jurisdiction or that the delivery of possession was merely symbolical is immaterial—27 C. W. N. 267. 37 C. L. J. 256. Where a decree-holder has obtained delivery of possession under (1) rt. rule 35, C. P. Code, in execution of his decree, the judgment debtor is precluded from raising the question, and a Magistrate acts illegally in starting a case under sec. 145 of the Crim. Pro. Code and in not upholding Civil Court's decree and delivery of possession given by that Court—5 P. L. J. 104. Where the Civil Court decree defined the boundaries of a *pikar* right, the Magistrate in instituting proceedings under this section ought to follow that decree and not attempt to an explanation of it—6 C. W. N. 161. Where one of the parties to a dispute regarding the land has been actually put in possession of the same by a Civil Court, as a result of sale under its decree, it is the duty of a Criminal Court to uphold the status of that party as established by the Civil Court—7 C. W. N. 118. Where a decree has been passed regarding the whole or any portion of a disputed land, it is the duty of the Magistrate to maintain the decree and he cannot institute proceedings under this section regarding the lands covered by it—16 W. R. 24 , 24 W. R. 17

Where a dispute between the parties had been terminated by an order under the provisions of secs. 40 and 41 of the Bengal Survey Act, and there had also been an entry in the Record of Rights in accordance with that order, the Magistrate should, in determining the question of possession between the parties in a proceeding under this section, presume that the possession of the land was with the owner who had title as determined by the decision under the Survey Act, and which title was further to be presumed from the entry in the Record of Rights—26 C. L. J. 39. An order under sec. 41 of the Bengal Survey Act has the same effect as the decree of a Civil Court and must be maintained by a Magistrate acting under this section—18 C. L. J. 301 (Cal). A summary decision under the Land Registration Act is entitled to the

same respect as a Civil Court decree on the question of possession, in a proceeding under this section—1 P L T 501, 1 P L T 588 But if in the land registration proceedings there was no adjudication of possession by the Revenue Courts and they refused to register the name of a particular party, the Magistrate in a proceeding under this section is bound to determine as to which of the parties was in actual and physical possession of the property in dispute—1 P L T 588

If a Magistrate fails to decide the effect of a Civil Court decree between the parties, on the question of possession he fails to decide an important issue and thereby fails to exercise jurisdiction—11 Cr L J 184 (Cal)

Again, the Magistrate in giving effect to a decree of the Civil Court is not entitled to go behind it or to put his own interpretation or construction upon it—1 C L R 273, 27 C W N 267 Thus where in execution of a Civil Court decree in a suit in which only one of the members of a Mitakshara family was a party, the whole of the family property was delivered over to the purchaser, it was not competent to a Magistrate acting under this section to declare that the purchaser should be put into possession of a fractional share and that the shares of those persons who were not made parties to the suit ought not to have been included in the decree—6 C W N 841

But every previous decree of a Civil Court or order of a Criminal Court is not necessarily conclusive the evidentiary value to be attached to such decree or order must depend upon the circumstances of each particular case—33 Cal 33 No hard and fast rule can be laid down to the effect that a Magistrate in a proceeding under this section must give effect to a prior decision or proceeding of a Civil or Criminal Court The Magistrate is not bound to maintain the decision blindly If after the passing of the decree the Magistrate finds that the party's possession has been disturbed or that the property has changed hands, he has jurisdiction to pass orders irrespective of the Civil Court decree—1 P L J 336

(1) *The decree must be recent* —It is the duty of the Magistrate to maintain the rights of the parties, when such rights have been declared by a competent Court within a time *not remote* from his taking proceedings under this section—26 Cal 625, 1 P L J 336, 3 P L T 618, 4 P L T 248 Thus, it is the duty of the Magistrate to have found possession in accordance with the decree of the Civil Court, when a party had been put into possession *eight days* prior to the institution of proceedings under this section—32 Cal 796, or within three months—29 Cal 208, 6 C W N. 38

But if the decree of the Civil Court is not recent but several years old it would be unsafe to act on that documentary evidence alone—5 W R 79 A decree which is 23 years old is not conclusive as to the question of possession, because it is not absolutely impossible that the party who obtained the decree 23 years ago should have been subsequently dispossessed—8 C W N 719 So also, with the case of a decree 17 years old—33 Cal 33 Even a decree four years is not sufficiently conclusive, and the Magistrate in disregarding that decree would not be acting without jurisdiction—11 C. W N cxx

(2) *The decree or order of the Court must give possession* —Possession must have been given to one of the parties either by the decree itself, or by an order of the Court in execution of the decree (*e g* to an auction purchaser)

Where the Civil Court deals only with the question of *proprietorship* of land, the decree of such Court will not bar a Magistrate from deciding the question of possession under this section—2 A L J 274 So also, where the suit in which the decree was passed was merely one for *damages*, in which the determination of title was incidentally necessary, but the suit was neither for possession nor for declaration of title, the decree in such suit was not conclusive as to possession and the Magistrate was competent to take proceeding under this section—16 M L J 53 So also, where the question of possession was raised by the parties, but was neither fought out between the parties nor decided by the Court, the decree would not bar proceedings under this section—15 Cr L J 663 (Mad)

There must be actual delivery of possession under the decree or order of the Civil Court Where merely the sale was confirmed and the sale certificate issued, but there was no delivery of possession actual or symbolical, to the petitioners, their rights were not protected by proceedings under this section—31 Mad 416 *Symbolical* possession given to the purchaser would raise the presumption that the purchaser had possession, although it may be that slight evidence would suffice to rebut that presumption—14 Cal 169

Where an order (of a Criminal Court) under section 522 of this Code was passed, directing restoration of immoveable property, but possession as a fact was never delivered to the petitioners, such infructuous order would not bar the jurisdiction of the Magistrate in taking proceedings under this section in respect of the same property—18 C W N 1088

Effect of previous decree on third party —Where in a proceeding under this section, it appeared that the first party previously brought a suit for rent against some persons not parties to the proceeding and purchased the disputed properties at the sale in execution of an *ex parte*

decree obtained therein, and was put into possession without the knowledge of the second party, and the Magistrate found that the rent suit was not a *bona fide* one brought by the landlord against tenants in possession, and declared the second party to be in possession of the disputed land, it was held that under the circumstances of the case the order of the Magistrate was not erroneous and was not liable to be set aside. A previous decree of the Civil Court relating to the proceedings in dispute may throw light upon the evidence on the matter, but the evidentiary value to be attached to such a piece of evidence must depend upon the particular circumstances of the individual case. Decrees of Courts so far as third parties are concerned may have different value in different cases. Where, for instance there has been a real contest between the parties to a suit and upon an *adjudication regarding title or possession* a party has been awarded a decree and has been put in possession in execution of such a decree, it would be conclusive upon any person even though he was not a party to the decree. But *money decrees* followed by sale of property would stand on a different footing. In these cases, the sale in execution only passes the right, title and interest of the judgment debtor consequently there is no adjudication regarding his *title* to property, and therefore it is not conclusive upon a third party as regards possession or title—23 C W N 982, 20 Cr L J 445 (Nag)

In estimating the value of delivery of possession against third parties it is also material to see what is the true nature of the possession said to have been delivered—23 C W N 982

Possession given by Criminal Courts —In proceedings under sec 145 the Magistrates have always upheld possession given by Civil Courts. But possession given by Criminal Courts cannot be treated in the same manner in which possession given by the Civil Courts is treated in cases under this section—2 C L J 147

Suit for damages for improper proceedings —Where proceedings are initiated under this section by a party who is eventually unsuccessful, it is not open to the successful party to sue for damages. The damages in such a case are remote and are sufficiently compensated by any order for costs that might be made in the proceedings—20 A L J 205

Limitation for subsequent civil suit —See Art 47 of the Indian Limitation Act

Striking off proceedings —Where proceedings under this section have once been started, the Magistrate has no jurisdiction to strike them off. He must pass an order either under sec 145 or under sec 146—20 Cr L J 464 (Pat)

Fresh proceedings —When an order under clause (6) has been passed, the section forbids all disturbances of possession until eviction

in due course of law, and a Magistrate cannot institute fresh proceedings so long as such order is in force—15 C. W. N. 568, 27 C. W. N. 171. But where the order was merely that the parties had compromised and that according to the terms thereof both sides should be in possession such an order is one falling under clause (5) showing that no dispute existed, and not an order under clause (6) and the Magistrate can therefore institute fresh proceedings—15 C. W. N. 568.

When a party has been declared to be in possession as a result of proceedings under section 145 fresh proceedings under the same section cannot be started against him unless it can be shown that the previous order has been duly vacated or possession has been amicably surrendered—1 P. L. T. 557.

During pendency of High Court rule—During the pendency of a rule issued upon the District Magistrate to show cause why his order under sec. 145 should not be set aside, it is irregular and highly improper for a Subordinate Magistrate to institute fresh proceedings, as proceedings in the Lower Court with reference to the matter in dispute must be considered to have been stayed. When a rule is issued by the High Court on the District Magistrate staying further proceedings all Subordinate Magistrates are bound by it, and would not be justified in instituting fresh proceedings during the pendency of the rule—4 C. L. J. 418.

Fresh materials—When an order striking off proceedings under this section is passed, its effect is to destroy the proceedings, and any thing done thereafter under this section must start afresh upon fresh materials, and not stand upon the basis of the earlier proceedings—20 Cal. 267, 6 C. W. N. 923, 2 P. L. T. 267, 3 Lah. 401.

Power of High Court—The High Court cannot direct the revival of proceedings under sec. 145, when they have been stayed by the Magistrate—30 Cal. 112.

Further Inquiry—Sec. 437 (now 436) allows a further inquiry into a complaint, which means under sec. 4 (h) a complaint of an 'offence' and since sec. 145 is not directed to any offence at all, sec. 436 does not authorise a District Magistrate or Sessions Judge to order a further inquiry in a case under sec. 145—20 Cal. 729.

Review—There is no authority for holding that a Magistrate can review a final order passed by himself under this section—35 Cal. 350, 16 O. C. 192.

Revision—Under sub section (3) of section 435, before it was omitted by the Amendment Act of 1923, proceedings under this Chapter were not proceedings liable to revision by any Court, whether by the High Court or by the Sessions Judge or by the District Magistrate or Sub-divisional Magistrate, so that the High Court, in the exercise of its

revisional jurisdiction under section 439 of this Code was not competent to revise an order passed under this Chapter—27 Cal 892, 25 Bom 179, 36 Mad 275, 26 M L J 208, 5 L W 165, 1914 M W N 79, 26 All 144, 31 All 150 36 All 233, 4 A L J 91 15 A L J 270 18 A L J 1140, 18 O C 69, U B R (1917) 35, 1 S L R 50 8 S L R 207 17 C P. L R 133

And in order to exercise its revisional power in respect of orders passed under this Chapter, the High Court had to invoke the aid of sec 15 of the Charter Act (26 Cal 188, 27 Cal 892 33 Cal 68, 27 Cal 219, 28 Cal 416, 24 All 315) or sec 107 of the Government of India Act (15 A L J 270, 1 P L J 336, 43 M L J 624, 47 Cal 438 48 Cal 522) But even then it could exercise such powers under the Charter Act only when questions of *jurisdiction* were involved, and the Government of India Act afterwards gave the power of interference under *all* circumstances

The only cases in which the High Court could exercise its powers of revision *under this Code* (sec 439) were those in which the proceedings, though purporting to be proceedings under this Chapter, were not really so, as for instance where there was an initial want of jurisdiction by reason of there being no dispute likely to cause a breach of the peace, or by reason of the Magistrate not being a first class Magistrate, or where the Magistrate exercised powers not conferred by this section—24 Bom 527, U B R (1917) 33 35, 7 Bom L R 475, 25 Bom 179, 25 All 537 43 M L J 624, 5 O C 1, 19 O C 136

Now by the Amendment Act of 1923 sub section (3) of section 435 has been omitted, and the effect of this amendment is to confer the power of revision under this Code in respect of orders under this Chapter not only on the High Court but also on the Sessions Judge the District Magistrate and the Sub divisional Magistrate

But though the High Court is invested with powers of revision, still orders under this section should not be lightly disturbed it is only in very exceptional cases that the High Court will interfere—17 Cr L J 143 (Mad), 17 Cr L J 286 (Pat) Orders passed by a competent Magistrate are not to be lightly interfered with by the High Court, *first* because the object of such orders is to preserve peace, and *secondly* because the aggrieved party has his remedy by civil suit—5 L W 165. Proceedings under this chapter are of a special nature, and are such that the Magistrates may be allowed greater liberty in carrying out those provisions than they are allowed in trying ordinary crime The provisions of this chapter are concerned with disputes relating to immovable property which are likely to cause a breach of the peace.

and give Magistrates power to deal with matters of a quasi civil nature, because upon the Magistracy and the police is thrown the burden of maintaining the public peace. In this view it is undesirable that such orders should be interfered with in revision, unless they are made without jurisdiction and are obviously unreasonable or unjust—16 Cr L J 767 (Mad). Where a Magistrate duly empowered to act under this Chapter takes proper proceedings and passes an order, the High Court has no power to revise those proceedings either under this Code or under section 15 of the Charter Act—31 All 150, or under section 107 of the Government of India Act—39 All 612, 40 All 364, 17 A L J 321.

Grounds of interference—The High Court has the power to interfere, where in a proceeding under this section parties were left out or wrong persons were made parties—27 Cal 892, or where the Magistrate refused to receive the evidence tendered to him—29 Mad 561, 11 A L J 586, 31 Cal 685, 34 Cal 840, 19 Cr L J 529 (Pat); or where no order in writing such as is required by sub section (1) was recorded by the Magistrate—1917 P W R 28, 20 Cr L J 124, 27 A W N 49, 1915 P L R 169, or where no copy of the preliminary order was served upon the parties or published in the manner laid down—1915 P L R 169, 33 Cal 68, or where the Magistrate adopted none of the procedure required under this section and passed an order without any reference thereto—1899 P R 2, 1902 P R 23, 1907 P R 7, 1915 P W R 32, 1916 P R 22 or where the order of the Magistrate was far too wide of the mark and opposed to law and justice—1912 P W R 33 or where the Magistrate refused to issue process for the attendance of material witnesses—30 Cal 508 (Note), or where no opportunity was given by the Magistrate to the applicant to produce his evidence—2 C L J 286*n*, or where the Magistrate discarded the evidence altogether and based his decision merely upon his local inquiry—10 C W N 181, or where the proceedings were initiated by the Magistrate on a vague Police report—11 C W N 198, or where the Magistrate declared possession with a party who has long been out of possession—20 Cr L J 445 (Nag), or where the Magistrate passed order in respect of property which was not in dispute and declared the property to be in possession of a person who was not a party to the proceedings—19 Cr L J 653 (Cal).

Power of High Court in revision—The High Court in the exercise of its power of revision, is competent to consider the whole evidence—14 Cal 361, and to find out whether there was evidence on which the Magistrate could come to the conclusion to which he arrived at—14 Cal 169, and can pass the proper order which the Lower Court ought to have made. Thus where it is difficult to come to a conclusion as to the

fact of possession, the wise and proper course is to pass an order of attachment under section 146 and if the Magistrate has in such a case passed an order under sec 145, the High Court in revision can alter the order under sec 145 to one under sec 146 of the Code—14 Cal 361, 22 Cal 297, 20 C W N 1014 The High Court has inherent power to give directions as to the disposal of property which was attached and has been dealt with by a subordinate Court in the course of proceedings instituted without jurisdiction under this section—48 Cal 522 (F B)

But the High Court cannot direct the institution of proceedings under this section, or the revival of such proceedings when they have been stayed by the Magistrate—30 Cal 112

Order as to costs—The High Court, as a Court of Revision, in dealing with an application under sec 145 cannot make any order as to costs of such application—O S C 227

146 (1) If the Magistrate decides that none of the parties was then in such possession, or is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach it until a competent Court has determined the rights of the parties thereto, or the person entitled to possession thereof

Power to attach subject of dispute

Provided that the District Magistrate or the Magistrate who has attached the subject of dispute may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of a breach of the peace in regard to the subject of dispute

(2) When the Magistrate attaches the subject of dispute he may, if he thinks fit, and if no receiver of the property, the subject matter in dispute, has been appointed by any civil court, appoint a receiver thereof, who, subject to the control of the Magistrate, shall have all the powers of a receiver appointed under the Code of Civil Procedure

Provided that, in the event of a receiver of the property, the subject matter in dispute, being subsequently appointed by any Civil Court, possession shall be made over to him by the receiver appointed by the Magistrate, who shall thereupon be discharged

Change—The two provisos and the italicised words in sub-section (2) have been added by sec 29 of the Criminal Procedure Code Amendment Act (XVIII of 1923) For reasons, see below

Conditions precedent—Sec 146 is a continuation of sec 145 and therefore the initiation of proceedings under section 145 is preliminary to an order under sec 146—2 A L J 149 Where the record showed that the Magistrate made an order under this section without following the procedure prescribed by sec 145, and that there was nothing to show that a dispute likely to cause a breach of the peace existed, the attachment was set aside—*Ibid*

The legality of an order under sec 146 depends upon its having been preceded by legal proceedings under sec 145, and where the whole proceedings under sec 145 are illegal (*e.g.* by reason of the Magistrate's failure to comply with the requirements of clause 4 of sec 145), an order made in the case under sec. 146 cannot stand on a better footing—1914 M W N 798

Magistrate's duty to make inquiry and take evidence—It is the duty of the Magistrate before taking proceedings under this section to take evidence and fully to inquire (see clause 4 of sec 145) into the fact of actual possession and to decide the case upon a finding on that fact (3 P L T 434) It has also to be seen whether on the evidence there is any likelihood of a breach of the peace—18 W R 4 It is his duty to enter into the question as to who has been who has not been in possession of the land in dispute, to take evidence on the point, and to record a proceeding thereon—1 C L R 86 An order passed under this section without examining any witnesses, although a number of them were present in Court, is invalid—35 C L J 291 Unless and until a Magistrate has made the inquiry contemplated by sec 145, that is to say, unless he has received and *considered the evidence* produced by the parties, the Magistrate has no jurisdiction to proceed under sec 146—15 Cr L J 470 (Oudh) When sec 146 (1) speaks of the Magistrate being unable to satisfy himself as to which of the parties was in actual possession, it contemplates that the Magistrate has considered the evidence fairly and judicially for the purpose of arriving at a decision (2 P L T 16) Where a Magistrate in a proceeding under sec 145 wrote a very short judgment without specially referring to the important documentary evidence of possession placed before him and made an order under sec. 146 on the ground that it was doubtful which of the parties was in actual possession, it was held that the order must be set aside and the case reheard by another Magistrate—23 C W N 910

Where the order of the Magistrate under sec 146 was based on no evidence produced by either side—40 Cal 105, 11 Cr L J 90 (Cal);

or was passed without examining the witnesses cited by the petitioner—2 Weir 110, or where the Magistrate discarded and rejected practically every piece of evidence that might have led to a correct finding as to possession—26 C L J 39, or where the Magistrate omitted to receive evidence produced by a party and passed his order merely on a consideration of the written statement of the parties—34 Cal 840, his order was without jurisdiction. So also, where in a proceeding under sec 145, the parties appeared on the day of hearing but did not file any written statement nor produce any evidence and where the Magistrate without granting time to the parties for the production of evidence or for filing written statements found it impossible to come to a conclusion as to the fact of possession and passed an order under this section, the order was made without jurisdiction and therefore invalid—12 C W N 896. But where the parties failed to adduce evidence, even though sufficient time was allowed to them to do so, the Magistrate may proceed under this section—14 C W N 80.

But it is not incumbent on the Magistrate to make a local investigation as contemplated by sec 148. A Magistrate who attaches the property without such an investigation does not commit an error in procedure—20 Cr L J 17 (Cal).

Effect of prior decree of Civil Court—Where the petitioner had been put into possession of certain lands in execution of a decree obtained by him in a Civil Court establishing his right to them, the Magistrate was not competent to attach the lands under section 146. It was his duty to have found possession in accordance with the decree—32 Cal 796. See notes under this heading under section 145.

When attachment can be made—A Magistrate is competent to attach the land under this section where he is unable to determine the fact of possession—1 C L R 86. When it is difficult for a Magistrate trying a case under section 145 to come to a conclusion as to the fact of possession, the wise and proper course to be adopted is to pass an order of attachment under this section—14 Cal 361, 22 Cal 297. The power conferred by this section can be exercised when the Magistrate decides that none of the parties are in possession, or is unable to satisfy himself as to which of them was in possession—6 Bsm L R 723, 15 A L J 270. This section was intended to apply to a case in which on the evidence before him a Magistrate could not find possession with either of the parties—27 Cal 785, 9 C W N 887, 5 C W N 105, or when it was not possible to decide which party was in possession—2 Weir 110, 8 M L T 447.

Where the Magistrate finds neither the first party nor the second party in possession, but finds that actual possession is with a stranger

who does not claim a right to be in possession, the Magistrate should proceed to attach the property—20 Cr. L. J. 215 (Cal.)

When *both* parties are in possession of the disputed property, no order under this section can be made—27 M. L. J. 169. Where the Magistrate found that both parties at the time of the order were collecting rents from the tenants this amounted to a finding that both parties were in possession, and consequently the Magistrate had no jurisdiction to order attachment under this section—9 C. W. N. 887.

Dispute as to collection of rents —Where there is a dispute merely as regards collection of rents, there being no dispute as to the extent of the share or as to the fact of being in possession in respect of the village in dispute, a Magistrate has no jurisdiction to proceed under section 146—10 O. C. 89.

Inability to decide —The doubt upon which a Magistrate can act under this section must be the result of his inability to determine *upon the evidence* offered by both parties and not a doubt in his mind entertained without receiving evidence and without inquiry—1 C. L. R. 273, 2 P. L. T. 16, 23 C. W. N. 910. Where the order under this section did not show that it was not possible on the evidence to decide as to the fact of possession, but would rather seem to indicate that the Magistrate could not or would not decide whether the witnesses on either side were to be believed, the order was set aside—2 Weir 120.

Nature of possession —In a dispute between the wife of a lunatic and the Manager of his estate as to the possession of certain property, there was no doubt that the wife was in actual possession of the property, but the only doubt existed as to the *nature of the possession*, that is whether her possession was on her own behalf or on behalf of her lunatic husband, it was held that such a doubt as to the *nature* of the possession would not justify a Magistrate in taking action under this section—3 C. L. R. 94.

Portion of subject of dispute —Where there is a dispute as regards the possession of a fishery extending over several miles in length, and the Magistrate is unable to satisfy himself as to the possession of the whole length in question, he should ascertain so far as he can the possession of some portion or portions thereof. As to the portion as to which he is able to say that so and so is in possession he should proceed under section 145, and only as to the remainder should he proceed under section 146—20 Cr. L. J. 17 (Cal.)

Rights of parties —The Magistrate can attach property only on the ground that he cannot satisfy himself as to which of the parties is in possession, and not on his inability to decide upon the *rights* of parties—6 Bom. L. R. 723, 7 Bom. L. R. 18.

'Then' —i.e. at the date of the preliminary order passed under section 145 (1) See notes under section 145 (4)

Order of Attachment —An order under this section cannot be made in the absence of parties or *ex parte*, the proper course is to pass order in the presence of both parties—19 Cr L J 225 (Pat)

A Magistrate in passing an order under this section must give *reasons* for making the order—2 P L T 16 But no hard and fast rule can be laid down as to when the High Court will interfere with the judgment of a Magistrate under this section on the ground that the order is brief and does not state reasons at length If the High Court is satisfied that the Magistrate has given full consideration to the evidence on the record it will not interfere merely on the ground that the order is a brief one—37 C L J 127

Form of order of attachment—See Schedule V, Form XXIII

Signature of Magistrate —Where in a proceeding under this section, the Magistrate initialled the order, instead of signing it it was held to be a mere irregularity, not affecting the order—12 C L R 221

What property can be attached —In order that an order might be passed under sec 145 or 146 the subject matter of the dispute must be clearly determined—11 C W N 198

Component parts —The subject matter referred to in secs 145 and 146 must be read as referring to the whole or to any component part or parts thereof If the component part in respect of which the dispute exists is distinct and separable from the rest the Magistrate is not bound to attach the whole property but may attach that part only If, however, the subject matter in dispute is indivisible and must be dealt with as a whole, it must be dealt with in such a way as to make in regard to it one order under this section—5 C W N 710, see also 22 Cal 297 cited under sec 145

Narrow strip of land —Where the dispute is as regards a narrow strip of land at present occupied by a hedge forming the boundary of contiguous lands belonging to the rival disputants, the Magistrate should, instead of attaching the land, come to a decision on the evidence submitted to him with reference to the point of possession—4 W R 26

Temple —To attach a temple does not necessarily mean that the temple must be closed altogether When third parties or the general community are interested in it, it is the duty of the Magistrate when assuming charge of it in order to preserve the public peace to make the best arrangements possible to preserve the rights of such third parties or the public, and to have the *pūja* of the temple performed—2 Weir 110, 2 Weir 112

Crops —The Magistrate has no jurisdiction to attach crops cut and stored, the word 'crops' occurring in sec 145 refers to standing crops alone—30 Cal 110

In a dispute between rival landlords as to possession of land, the Magistrate is not competent to attach the crops on the land belonging to tenants—5 C W N 105

Moveables —The Magistrate ordering attachment of immoveable property can take charge of all moveables found inside the immoveable property, although he cannot attach the moveable property by itself under this section. Therefore, where the Magistrate attached a *mulh* and took charge of all cattle that were found by him in the *mulh* at the time of attachment, it was held that the Magistrate acted legally—1 P L J 356

Cultivation of attached land —A person who cultivates immoveable property which has been attached by a Magistrate under this section commits the offence of criminal trespass, and he is liable to be punished under sec 447 I P C—8 M L J 253. No suit for damages for the loss of profits resulting from the non cultivation of land owing to an attachment under this section lies against any party—6 Mad 426

Powers of Magistrate —A Magistrate attaching a property under this section has power to make any order regarding the management of the property. The High Court will not interfere with such order—29 Cal 382. He can lease the land attached—17 W R 38, or after cancelling a lease already granted, can grant a fresh lease—29 Cal 382

A Magistrate passing orders under this section is entitled to refuse to hand over the value of the produce of the property to any of the parties to the dispute, but he has no power to treat the profits claimed as *derelict* and as the property of the Government—1911 P L R 123

A Magistrate attaching a property under this section cannot review that order (see below) or hand over possession of the property to one of the contending parties on failure of the other to institute a suit for possession in the Civil Court—3 P L T 648

Possession by Magistrate —When a Magistrate attached lands under this section, the possession of the Magistrate must be taken to be a possession on behalf of such of the rival parties as might establish a right to possession by a civil suit—32 Cal 856. The legal possession of property is said to be in the true owner during the period of attachment—26 Mad 410, 49 Cal 544, 22 C L J, 283, 20 C W N 481, 34 C. L. J. 302.

Decision of a competent Court —The attachment is to continue until a competent Court has determined the rights of the parties, and therefore it is the duty of a Magistrate to withdraw the attachment as soon as it is brought to his notice that a competent Court has determined the rights of the parties or of the person entitled to possession—17 M L T. 392, and the fact that an appeal has been preferred against the decision of the Civil Court and is pending is no good reason for the Magistrate to keep the property any longer in attachment—1917 P W R 46, 7 Bur L T 293

It is not necessary that there should be a decree in favour of *all* of the parties to enable the Magistrate to withdraw an attachment made under this section, and if there is an adjudication by a Civil Court in favour of some at least of the parties, that is sufficient for the purpose of enabling the Magistrate to walk out of the property—(1916) 2 M W N 173

A Magistrate is not entitled after the decision of the Civil Court to retain in his hands the profits derived from the attached property during the period of attachment—13 A W N 100

The expression '*competent Court*' means not only a Civil Court, but includes a Survey Court—37 Cal 331

Under the old Code, the words were 'Civil Court' and therefore it was held in 15 All 394 that the section did not authorise a Magistrate to pass an order of attachment in a dispute between parties, whose rights would have to be determined by a *Revenue Court*. But this ruling is no longer good law

Persons bound by order of attachment —Judicial proceedings cannot bind a person who is not a party to them. A final order under this section cannot be made against persons who were not made parties to the proceedings under sec 145, nor were regarded as such by the Magistrate, (though notices had been issued upon them to file written statements, and they entered appearance but did nothing else)—3 C W N 329

Proviso—withdrawal of attachment —"We have introduced a new clause which by an amendment of section 146 will enable a District Magistrate to withdraw the attachment of property at any time when he is satisfied that there is no longer any likelihood of a breach of the peace"—*Report of the Joint Committee (1922)*

Where the petitioner presented an application to the Magistrate praying for the release of the attached house on the ground that the other claimant had died and that he (the petitioner) was his heir, and the Magistrate refused the application as no judgment of competent Court declaring the rights of parties was produced, *held* that the Magistrate

ought to have granted the application and released the property from attachment, because by the death of the other claimant all likelihood of a breach of the peace had disappeared—1 Lah 451 This proviso now expressly provides for the case

Sub section (2)—Appointment of Receiver —A Magistrate is entitled to appoint a Receiver under this sub section only after the termination of the inquiry as to possession conducted under sec 145 (4) The appointment of a receiver before the completion of the inquiry is without jurisdiction—13 Cr L J 536 (Mad)

A Receiver appointed under this section is entitled, unless some special circumstance is established not only to the subject matter of the proceedings, but also to all accretions to the property, and gives good title to a tenant under him—14 C W N 681

Proviso —‘ We recommend the addition of a proviso to section 146 (2) to meet the case of an overlapping appointment of a receiver by the Civil Court —*Report of the Select Committee of 1916*

Revision —By reason of the omission of subsection (3) of section 435 by the Criminal Procedure Code Amendment Act of 1923, orders passed under this section are now liable to revision, not only by the High Court but also by the Sessions Judge, the District Magistrate and the Subdivisional Magistrate See notes under sec 145

Review —An order under this section is in the nature of a judgment and cannot be reviewed by the same Court—19 Cr L J 225 (Pat), 3 P L T 648, see section 369 When a property is attached under this section, the Magistrate has jurisdiction to release it from attachment, but he has no jurisdiction to review his own order releasing the attached property—19 Cr L J 105 (Pat)

147 Whenever any such Magistrate is satisfied as aforesaid that a dispute likely to cause a breach of the peace exists concerning the right of use of any land or water (including any right of way or other easement over the same) within the local limits of his jurisdiction, he may inquire into the matter in manner pro-

Dispute concerning case—
Disputes concerning
rights etc

147 (1) Whenever any District Magistrate, Sub divisional Magistrate or Magistrate of the first class is satisfied, from a police report or other information, that a dispute likely to cause a breach of the peace exists regarding any alleged right of user of any land or water as explained

Dispute concerning right of use of immovable property etc

vided by section 145, and may, if it appears to him that such right exists, make an order permitting such thing to be done, or directing that such thing shall not be done as the case may be, until the person objecting to such thing being done or claiming that such thing may be done, obtains the decision of a competent Court adjudging him to be entitled to prevent the doing of, or to do such thing, as the case may be.

Provided that no order shall be passed under this section permitting the doing of any thing where the right to do such thing is exerciseable at all times of the year, unless such right has been exercised within three months next before the institution of the inquiry, or, where the right is exerciseable only at particular seasons or on particular occasions unless the right has been exercised during the last of such seasons or occasions before such institution.

in section 145, sub section (2) (whether such right be claimed as an easement or otherwise) within the local limits of his jurisdiction he may make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend the Court in person or by pleader within a time to be fixed by such Magistrate, and to put in written statements of their respective claims, and shall thereafter inquire into the matter in the manner provided in section 145 and the provisions of that section shall as far as may be be applicable in the case of such inquiry

(2) If it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right

Provided that no such order shall be made where the right is exerciseable at all times of the year, unless such right has been exercised within three months next before the institution of the inquiry or where the right is exerciseable only at particular seasons or on particular occa-

sions, unless the right has been exercised during the last of such seasons or on the last of such occasions before such institution

(3) *If it appears to such Magistrate that such right does not exist, he may make an order prohibiting any exercise of the alleged right.*

(4) *An order under this section shall be subject to any subsequent decision of a Civil Court of competent jurisdiction.*

Change —This section has been thoroughly redrafted by sec. 30 of the Criminal Procedure Code Amendment Act (XVIII of 1923), and the substantial changes introduced by this redrafting have been shown by the italicised passages

The principal changes are —“(1) The definition of the subject matter in dispute has been modified so as to avoid the difficulties which have been created by decisions raising doubts as to the applicability of the section to rights not resembling easements or to rights acquired by contract, (2) the specific reference to rights of way has been omitted, as it has been questioned whether it might not by implication exclude negative easements from the scope of this section, (3) the nature of the orders which a Magistrate may pass (see subsections 2 and 3) and their continuance pending the order of a competent Civil Court to the contrary (see subsection 4) have been clearly defined”—*Statement of Objects and Reasons* (1914) (4) The words “make an order in writingrespective claims” have been added to bring this section into a line with sec. 145 “Doubts have been expressed as to the procedure to be followed in cases under section 147, and we have introduced amendments here to make it clear that the procedure is to be that laid down by section 145”—*Report of the Joint Committee* (1922)

Dispute :—In order to found the jurisdiction of a Magistrate to proceed under this section, it is necessary that a dispute exists between two persons concerning the right to the use of any land or water—22 W. R. 48 The dispute contemplated by this section must at any rate

be some substantial dispute necessitating the interference, in some way or other, of the criminal authorities. It would not be sufficient that there should be a mere discussion or verbal altercation between persons claiming rights of the kind described. There must be an actual dispute.—5 Cal 194. See notes under sec 145.

If on entering on an inquiry a Magistrate finds that the rights of parties have been judicially ascertained by a decree of Civil Court he should not enter into any investigation, as he can not assume that a dispute would be continued on a question which has been set at rest by judicial decision on the rights of parties.—11 Bom 584.

Likelihood of breach of peace—An order cannot be passed under this section unless the Magistrate is of opinion that the dispute is likely to cause a breach of the peace.—6 M L J 193. In order to give jurisdiction to a Magistrate under this section, he must be satisfied from Police reports or other materials, that there is an imminent danger of a breach of the peace resulting from a dispute between the parties concerned. Where the materials before the Magistrate did not disclose the fact that there was an imminent danger of a breach of the peace any evidence that he might have taken later on, in the course of the trial could not give him a jurisdiction which he did not otherwise possess.—23 Cal 557. See also notes under this heading under sec 145.

Right to use land or water—This section applies to disputes as to the right to use any land or water, as distinct from dispute as to title to possession of the land itself.—16 O C 192.

In a Madras case it was held that the words "land or water" used in this section should be taken in their ordinary significance without the extended meaning given to them by section 148.—17 Cr L J 235 (Mad). In a Calcutta case also it was held that the word "land" in this section did not include crop or produce as to sec 145.—24 C W N 1039. The present amendment, however, gives those words the same meaning as is assigned by sec 145.

Since this section as now amended includes rights claimed as an easement it therefore applies to rights to the use of land or water belonging to others. See also 4 C W N 779. The contrary view taken in 29 Mad 97 is no longer correct.

Right to 'tol' from a hat—A dispute as regards right to collect 'tolas' (small perquisites) from *hat* on one day every year, is one concerning the right of use of any land within the meaning of this section.—21 C W N 439=24 C L J 437.

Rights arising out of contract—Prior to the present amendment of this section, it has been held that a dispute between landlord and tenant regarding the right of the latter to reconstruct a *gola* which has fallen

down is not a matter properly coming within the operation of sec. 147. The settlement of such a dispute will involve issues of right which can properly be determined by a Civil Court. The right of use of land contemplated by s.c. 147 is one of an entirely different description resembling a right of easement, not one arising from the terms of a contract between landlord and tenant—4 C. W. N. 779. See also 29 Mad 97. But this is no longer the law. By reason of the present amendment, the rights arising out of a contract will also fall under this section. See notes under "Change" above. Before the present amendment, the words of the section were "the right of use of any land or water (including any right of way or other easement over the same)." The words of the present section are more general.

Right to use of water —A Magistrate can take action under this section if he is satisfied that a dispute regarding the right to irrigate from a tank is likely to cause a breach of the peace—O. S. C. 64. Where it was found that the plaintiff had a right to the flow of water for purposes of irrigation from a certain channel passing through a village of the defendant who obstructed such flow by erecting *bunds*, it was held that the Magistrate was competent, under this section, to direct the removal of the obstruction—5 C. W. N. 67, 36 Cal. 923; 13 W. R. 51.

Where Christians were prevented by Hindus from the lawful exercise of their right to take water from a well, it was held that the Magistrate had jurisdiction under this section to pass an order forbidding the Hindus from interfering with the exercise of that right—1911 M. W. N. 44.

Right to let off water —The right to let off water by the natural course in which it has always flowed and would always flow, so as to prevent inundation of one's own land is a natural right of every landholder to the use and enjoyment of his own land. Where the second party erected a *bund* on the boundary of the first party's village to prevent the flow of such water, the Magistrate had jurisdiction to direct the removal of the *bund*—15 C. L. J. 267.

Right to fish —There is nothing in this section which limits its operation only to easements. This section relates also to rights in the nature of easements, for instance, the right to fish in a *bhil*—23 Cal. 55, 23 Cal. 557.

Right to ferry —A dispute regarding right to use a ferry comes within the scope of this section—3 C. W. N. 148.

Right to take sandal paste from idol —A right to take sandalwood paste removed from the person of the idol is not a right of use of any land or water or a right of way, within the meaning of this section, and therefore this section does not apply to a dispute regarding such right—4 Bom. L. R. 438.

Right to worship —A right to perform the duties of a Pujari in a temple is not a right to the use of any land. It is the worship which is disputed and not the use of land. Therefore a dispute regarding such a right cannot be the basis of a proceeding under this section—37 Cal 578. Where the matter in dispute cannot be adjudicated by a Civil Court (*e g* disputes relating to performance of worship and other religious ceremonies), Magistrates have no jurisdiction to deal with those matters under sec 147. In such matters, where the Magistrate apprehends that there will be a breach of the peace, he is to adopt the procedure prescribed by Chapter VIII, and to take security—14 Bom 25. But in 11 Mad 323, 29 Mad 237 and 3 Bom L R 416, a right to worship in a mosque or to officiate as *Kaz* therein or to perform a *puja* has been held to come within the operation of this section.

A dispute as regards the offerings made in a temple is a dispute as regards moveable property, and therefore does not fall under this section—38 Cal 387.

Right of privacy —A right of privacy, *e g* a right to enter upon the premises of another and close the windows and doors to ensure privacy does not fall under this section—Ratanlal 357.

Right to use a privy is not a right to the use of land and water and therefore is not contemplated by this section—15 Bom L R 329. But it will now fall under this section.

Obstruction to a drain —Obstruction to a drain into which the sewage of the petitioner's premises falls, does not come under this section—5 W R 58.

Right of way —A Magistrate is competent to order the removal of an obstruction to a right of way caused by the owner of the land, if there be a likelihood of a breach of the peace in consequence of such obstruction—5 C W N 335. In a dispute as to the right of way, the Magistrate should decide whether the complainant had been in use and occupation of the road, and if so, for how long and if he finds him to be in possession, should retain him in it, leaving the owner of the land to refer the question of the right to the easement to the Civil Court. The Magistrate should not decide against the complainant because he may have another right of way leading to the same place—2 W. R 64.

Right to use public way —The Magistrate has jurisdiction under this section to pass orders even against the right of passage through a public street. But he ought not to pass such a prohibitory order, unless it is clearly proved that there is a right by custom or by grant or by a Statute in one section of the public to prevent another section of the public from using the public street on particular occasions or for particular purposes, when such use is ordinarily and *prima facie*

lawful—16 Cr L J 767 (Mad) When the subject of a dispute is a public highway, a Magistrate has no power to object to the lawful use of it by any class of persons Except when danger to the public health is occasioned, the conveyance of a corpse along a highway is not an unlawful use of the highway Therefore an order that the Hindus should not carry corpses through a street to which the Muhammadans objected, is illegal—7 Mad 49 The right to use a public way for carrying corpses is a natural and ordinary right of citizens, and it is open to question whether section 147 applies to cases of dispute concerning the exercise of such a right—6 M L J 193

Right to prevent procession —A Magistrate is not authorised to pass an order prohibiting a religious procession under this section where he has not found that the right to prevent such a procession exists in the complaining party—Ratanlal 548

Easements —This section is not confined to easements acquired by uninterrupted enjoyment for 20 years provided by sec 26 of the Limitation Act—13 C W N 859 This term includes profits *a prendre* —23 Cal 55

This section is not limited in its operation only to easements, but relates also to rights in the nature of easements, *e.g.*, a right to fish—23 Cal 55, or a right to moor boats and dry fishing nets on the land of another—21 Cr L J 697 (Cal)

This section applies to positive as well as to *negative* easements See the *Statement of Objects and Reasons* cited under heading "Change" *supra*

Preliminary order in writing —This section as now amended requires that the Magistrate must record, as under section 145, a preliminary proceeding stating the ground of his being satisfied as to the likelihood of a breach of the peace The contrary rulings in 2 C W N 670 and 27 M L J 587 are hereby overruled

Inquiry as under Sec 145 —A case under this section is to be decided by the same procedure and on the same principles as a case under sec 145—38 Cal 387 Section 147 clearly says that the procedure under this section must be as under sec 145 which includes the filing of written statements, taking of evidence, and if necessary local investigation—15 C W N 667 Therefore an order under this section passed on proceedings taken under sec. 133, without any action in accordance with sec 145 is without jurisdiction—15 C W N 667

Long and protracted inquiry—question of title —Where a case under this section is likely to involve a long and complicated inquiry and the presence of a large number of people, the proper course for the Magistrate to follow is to bind down under sec 107 such of the

persons as are likely to disturb the peace—23 Cal 557 So also, where the settlement of dispute involves issues of *right* which can only be determined by a Civil Court, the proper course for the Magistrate is to proceed under sec 107—4 C W N 779 29 Mad 97 36 Cal 923 This section does not convert the Magistrate into a Civil Court, which is to determine the *rights* between parties or to discuss and consider any *proprietary* damage done to individuals—22 W R 48

Inquiry by subordinate Magistrate —Where a District Magistrate on being satisfied that there exists a dispute likely to cause a breach of the peace refers the case to a Magistrate for inquiry, the latter is bound under this section to inquire into the matter in the manner provided by Sec 145—3 Bom I R 416

Notice to parties —The inquiry contemplated by this section is a judicial inquiry and the opinion to be formed must be a judicial one formed upon evidence legally before the Magistrate The evidence before the Magistrate would not be legal, if it were taken behind the back of persons who claimed or denied the right, *i e* if they had not been represented at the inquiry and had *no notice* of it—21 Cal 727 Where an order was passed under this section without giving notice to the party concerned, the order was without jurisdiction and liable to be set aside—1909 P L R 105

Actual notice should be given to all the persons claiming or denying the right, notice to servants of such persons is not equivalent to notice to them—21 Cal 727 The inquiry presumes not that one party only, but that *both* parties to the dispute will be afforded the opportunity of appearing and adducing evidence on all the material facts—4 Mad 121

Parties —In an inquiry under this section, it is sufficient if persons who claim for themselves the right, though that right be derived from others (*e g* right to fish in a *dhul*) are made parties It is not necessary that the proprietors (of the *dhul*) should be added as parties—23 Cal 55

A Magistrate is not competent to add parties to a proceeding under Sec 145—5 C W N 67 An order made after the addition of parties is null and void only as against the added party, but is binding on those to whom it is properly directed—5 C W. N 67

Evidence —The inquiry contemplated by this section is a judicial inquiry and the opinion of the Magistrate must be a judicial one formed upon evidence legally before him—21 Cal 727 A party against whom proceedings are instituted is entitled to produce evidence to prove that the case does not fall within this section—1909 P L R 105 In a matter

under this section, the Magistrate is bound to hear the evidence tendered by the parties. He cannot summarily deal with the case after local inspection—4 C W N. 779. A decision of the Magistrate based substantially upon the impressions obtained as a result of his local inspection is bad and liable to be set aside. But a decision based on the evidence as well as local inspection (the one corroborating the other) is not illegal—2 P L T 681. An order passed merely on a written statement without taking any evidence in proof of the allegation contained in the written statement is bad in law—35 Cal 918. So also an order passed without giving the parties an opportunity of calling evidence is one without jurisdiction—25 Cr L J 110.

But where the allegation of one party is admitted by the other, no evidence is necessary in addition to the written statement—7 C W N 351.

Burden of proof—The right to restrain another from exercising ordinary proprietary rights over his own land, *eg* the right to cut a *bund* on his own land and use the water standing on his own land, is of the nature of an easement different from ordinary rights of owners of land. The burden of proof that such a right exists lies on the party alleging it—11 Cal 52.

Evidence of user—The evidence of user (under the proviso to sub section 2) must be such as to show satisfactorily acts of enjoyment exercised as a matter of right and permitted uninterruptedly for some considerable length of time—4 M H C R App 26. Where the right is exercisable at all times of the year, there must be a finding that the right was exercised within three months—14 Cr L J 303 (Cal), 1909 P L R 105, 2 P L T 364. Where it is proved that the first party has had an uninterrupted use of water of a *nala* for a period of 20 years, which they have enjoyed as an easement and of right and the erection of a bund has led to a dispute, there is then a sufficient finding that the right in dispute has been exercised within either of the periods mentioned in the proviso—5 C W N 67.

Order—*Declaratory order*—The order under this section is one permitting a thing to be done or directing that a thing shall not be done. This section does not enable the Magistrate to make a purely *declaratory* order. It only enables him to prevent arbitrary interruption by any person of rights actually enjoyed, which have been exercised by the public or by a person or a class of persons—5 Cal 194. This section is not intended to provide a substitute for a civil suit to declare the rights of parties, but only empowers the Magistrate to order that possession shall not be taken by any party to the exclusion of the public until that party establishes his right in a Civil Court—6 W. R 74.

Order to remove obstruction —A Magistrate is competent to make an order for the removal of an obstruction to the right of way, if there be a likelihood of a breach of the peace in consequence of such obstruction—5 C W N 335, or an order for the removal of an obstruction to the right to the flow of water caused by the erection of bunds—5 C W N 67, 36 Cal 923 20 Cr L J 209 (Pat) If the obstruction is caused to a *public* way or thoroughfare, the Magistrate has no power to order for the removal of such obstruction under this section, but should proceed under Chapter X (Sec 133)—1 WEIR 143, 5 W R 5, 4 Mad 121 In 26 M L J 233, and 16 Cr L J 767 (Mad) however it has been held that Sec 147 can be applied whether the right of way claimed is a right to public path or a private path the terms of the section are wide enough to cover both cases, and the fact that Sec 133 expressly provides for an order by the Magistrate directing the removal of obstruction to public pathways does not necessarily imply that a similar order cannot be passed in proceedings under Sec 147

This section does not enable the Magistrate to *order the Police* to remove the obstruction There is no indication in the Code that the Legislature intended the Magistrate to carry out an order under this section through the agency of the Police This section clearly contemplates orders directed to persons who are parties to the dispute—36 Cal 923, *contra*—15 C L J 267, where it was held that the Magistrate has jurisdiction to direct the complaining party to remove the obstruction with the assistance of the Police

Prohibitive order —Under subsection (3) a Magistrate has jurisdiction to make a *prohibitive order* ("order directing that such thing shall not be done") against a party who is found not to have the right which he claims Where the first party claimed a right of passage over certain land which the other party denied, and the Magistrate found that the right of easement did not exist, the Magistrate had jurisdiction to pass an order directing that the first party shall not use the right of passage until he obtained the decision of a competent Court adjudging his right—20 Cr L J 251 (Cal)

Order must affect parties only —This section contemplates an order to be passed between parties to the proceedings only An order affecting persons who are not parties to the proceedings is not within the purview of this section and is therefore liable to be set aside as affecting jurisdiction—20 Cr L J 110

Effect of order on subsequent suit —The fact that in a dispute relating to a right of way, a Magistrate has passed an order in favour of the party claiming that right, does not relieve that party from the *onus* of

proving the claim in a subsequent civil suit brought to establish that right—2 C L R 555

Duration of order —An order under this section is bad in form, if it contains no restriction of time for which it is to operate—14 Bom 25

Revision —See notes under Sec 145

148 (1) Whenever a local inquiry is necessary for the purposes of this Chapter, any District Magistrate or Subdivisional Magistrate

Local Inquiry

may depute any Magistrate subordinate to him to make the inquiry, and may furnish him with such written instructions as may seem necessary for his guidance, and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid

(2) The report of the person so deputed may be read as evidence in the case

(3) When any costs have been incurred by any party to a proceeding under this Chapter for witnesses, or pleaders' fees or both, the Magistrate passing a decision under section 145, section 146 or section 147 may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding, and whether in whole, or in part or proportion. All costs so directed to be paid may be recovered as if they were fines

(3) When any costs have been incurred by any party to a proceeding under this Chapter [* * *] the Magistrate passing a decision under section 145 section 146 or section 147 may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding, and whether in whole or in part or proportion. *Such costs may include any expenses incurred in respect of witnesses and of pleaders' fees which the court may consider reasonable*

Change —The italicised words show the amendment effected by sec 31 of the Criminal Procedure Code Amendment Act (VIII of 1913) for reasons, see below under heading "Costs"

Local inquiry —“Local investigation should only be ordered in cases where they are absolutely required by the Courts, on subordinate points for a determination of the main issue in the case, for instance in cases in which it is necessary to ascertain by measurement disputed areas of land, or to ascertain whether particular lands are identical with the land detailed in documents, and in such cases only. When however any fact can be elicited by evidence that evidence should be heard by the Court itself—Cal H C Cir No 41 of 1866. The scope of local inquiry is extremely limited. It should be restricted solely to some question relating to the feature of the property about which the dispute has arisen and should not be directed to any matter which can be proved before the Magistrate by oral evidence, such as the question of actual possession—3 C L R 131. Thus in a case where the levels and the fall of water are concerned, local inspection is eminently necessary—15 C L J 267.

There is no hard and fast rule that in every case under this chapter a local investigation must be held whether the parties desire it or not—20 Cr L J 17 (Cal). For instance, it is not incumbent on the Magistrate to hold such an investigation whenever he is unable to ascertain as to which party is in possession—*Ibid*.

The term “local inquiry” in this section contemplates delegation of *judicial* functions, the mere making a survey of the disputed land and preparing a map thereof do not amount to a local inquiry under this section, because they are not judicial but purely ministerial acts and such acts can be entrusted to a person other than a Magistrate e.g. a pleader Commissioner (or even an amin). The report of such a person cannot be read as evidence under subsection (2) but he must be called as a witness and examined and cross examined as to his report—1 Pat 75.

Who can make the inquiry —The trying Magistrate can himself make the local inquiry. Though as a rule it is better to have the local investigation carried out by some other person, there is nothing in law to prevent the presiding Magistrate from conducting the inquiry himself provided he records which he saw and does not act upon hearsay evidence—15 C L J 267.

This section empowers the presiding Magistrate to depute a subordinate Magistrate to make the inquiry, but the person deputed must be a Magistrate, not a *Kanungo*—7 C L R 352.

The deputed Magistrate must make the inquiry himself he cannot delegate it to some body else—20 Cr L J 107 (Nag).

Recording evidence by the deputed Magistrate —The local inquiry authorised by this section is not merely a local inspection by the sub

Magistrate, but includes the act of recording evidence by such Magistrate in the course of the inquiry. But the recording of evidence by the sub Magistrate does not absolve the trying Magistrate from the duty imposed upon him by Sec. 145 (4) of receiving any evidence produced before him by the parties, and taking any further evidence he may find necessary. Where a first class Magistrate recorded no evidence himself but acted upon the evidence taken by a sub Magistrate at a local inquiry the former must be deemed to have acted without jurisdiction, but this defect or irregularity will be cured by Sec 537 and the High Court will not interfere—33 M L J 78

Report of the deputed Magistrate —Subsection (2) provides that the report of the deputed Magistrate may be read as evidence in the case, but it is not necessary to examine such Magistrate on oath as a witness—12 Cr L J 480 (Cal)

When a local inquiry is instituted, and the result reported such report becomes part of the proceedings in the case and the party affected by it is entitled to be acquainted with the results of it and to have an opportunity of rebutting the report, if he thinks necessary so to do—20 Cr L J 107 (Nag), 21 W R 25

Decision based on report —A Magistrate cannot base his decision merely on the report of the subordinate Magistrate, without examining any witnesses—10 A L J 46, In 17 Cr L J 478 (Mad) and 14 Cr L J 302 (Cal) however, the Magistrate deciding the case on the basis of the report of the inquiry was held to have acted within his jurisdiction, so also in 33 M L J 78. Where the trying Magistrate based his order on the report of the sub Magistrate and on the evidence recorded by him during the local inquiry, and both parties were quite content to abide by the result of the sub Magistrate's inquiry, and no objections were advanced before the trying Magistrate against the sub Magistrate's finding, it was held that the order of the trying Magistrate was not without jurisdiction and should not be interfered with in revision—33 M L J 78

Costs —Before this section was amended by the 1923 Amendment Act, it was held that the only costs which a Magistrate could award under this section were those incurred for witnesses or pleader's fees or both. He could not make an order for any other costs, e.g. costs on account of damage to crops—32 Cal 602. So also he could not make an order as to the penalty paid by one party on behalf of the other under section 44 (3) of the Stamp Act in respect of an improperly stamped document produced in evidence in a proceeding under sec 145 of the Criminal Procedure Code—13 M L T 224

Under the present section as amended, the word "includes" shows that the Magistrate is able to award costs other than those incurred for pleaders' or witnesses' fees

In awarding costs for witnesses and pleader's fees the Magistrate should not include additional costs incurred for extra fees and for travelling and other expenses of a like nature incurred by bringing pleaders or counsels from a distance—9 C W N 887

A Magistrate has jurisdiction to award only the *actual* costs incurred—14 C W N 1xxiii The order awarding costs is a judicial order and therefore must be based on proper materials, there must be materials on the record to show that the Magistrate arrived at the figure as the result of the calculation of the costs incurred by the party. An order arbitrarily awarding a round sum of Rs 50 or Rs 100 as costs, without there being anything on the record to show that the said amount was *actually* incurred is bad in law and must be set aside—1 P L T 369 3 P L T 484, 2 P L T 267

Who can order costs—Only the Magistrate who passes the final order under Sec 145, 146 or 147 can pass an order *awarding* costs, though the *actual assessment* may be made by his successor This section cannot be interpreted as authorising the successor of the Magistrate who passed the final order under sec 145 to *award* costs to the successful party Where the Magistrate making the final order declaring possession left the district, and his successor made an order granting costs, the order as to costs was set aside as having been made without jurisdiction—13 O C 66

The Magistrate passing the order as to costs must be the Magistrate passing the decision—24 C W N 672, but he may or may not be the Magistrate *initiating* a proceeding under this chapter When the proceedings under this chapter are initiated by one Magistrate and the final order is passed by another, it is the latter Magistrate who can award costs under the section—29 Mad 373

Who can assess costs—Where the Magistrate who passed the decision under Sec 145 had already awarded the costs it is not necessary that the costs should be assessed by the same officer who decided the case—22 Cal 384 Another Magistrate (*e.g.*, his successor) has jurisdiction to assess the amount of costs—23 Cal 37 (dissenting from 21 Cal 609), 22 Cal 384, 15 C W N 811, 27 M L J 613 Though a Magistrate did not himself pass the order under sec 145, he still has jurisdiction to assess costs—10 C W N. 1030

Time of awarding costs—An order for costs should ordinarily be made at the time of the original order and in the presence of parties—24 Cal 757; 13 O C 66 The award of costs under this section should

be made by the Magistrate at the time of giving his decision, unless for any reason the consideration of the matter is reserved for any future stage of the proceedings—22 Cal 387 There is no decision which lays down that an order for costs must necessarily be made at the time the judgment is delivered—15 C L J 267 In the usual course an award should almost invariably be contemporaneous with the decision of the main question and the order passed thereon But the fact that the award of costs has not been made at the very time of the decision of the case, does not necessarily render the award invalid, and when the circumstances of a case really require it, the disposal of the question of costs may be postponed—29 Mad 373

If the order awarding costs is not passed at the time of passing the decision in the case, it must be passed within a reasonable time after the disposal of the case and in the presence of both parties—29 Mad 373, 47 Cal 974, 15 C L J 267 what is reasonable time must depend upon the circumstances of each case—47 Cal 974 An order awarding costs made long (three months) after the original order and without allowing all the parties affected an opportunity to appear and show cause is bad—24 Cal 757, 16 L W 613 But an order awarding costs made ten days after the passing of the order under sec 145 (6) is not illegal by reason of the delay—19 Cr L J 396 (Pat)

Time of assessing costs—An order awarding and assessing costs should be made at the time of the original order—24 Cal 757 This shows that the assessment of costs should be contemporaneous with the order awarding costs But there is no inflexible rule that the costs must be assessed at the time of passing the decision—22 Cal 384 Once an order as to costs is made, the amount of costs may be subsequently assessed—1913 M W N 771 But the assessment must be made within a reasonable time after the award of costs An assessment of costs more than two years after the date of the order for payment of costs is bad in law—21 Cal 609

Application by legal representative of successful party for assessment of costs—Where through the negligence of the Court's officers, the amount of costs was not included in the final order directing payment of costs to the petitioner, and nearly three years after, the legal representative of the petitioner, (the petitioner having died in the interval), applied to the Magistrate's successor in office for costs being assessed, it was held that the application was sustainable and the applicant was entitled to have the costs assessed Although the Criminal Procedure Code contains no special provisions for bringing on record the representatives of the deceased parties, still the Courts have power within reasonable limits to invent rules of procedure for that purpose, unless

weights used in the bazar, some reasonable allowance should be made for wear and tear and of the rough and ready methods of bazar shopkeepers—1913 P. R. 20

This section does not apply to the Police in the towns of Calcutta, Bombay and Madras, because similar provisions have been made in Calcutta by secs. 55 and 56 of the Calcutta Police Act (Bengal Act IV of 1866), in Bombay by sec. 4 of the Bombay City Police Act IV of 1902, and in Madras by sec. 32 of the Madras City Police Act III of 1888

See Act XXXI of 1871 relating to weights and measures of capacity, and the rules framed under sec. 11 of that Act. As to offences relating to weights and measures, see Chapter XIII, 1 P. C.

PART V.

INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE.

CHAPTER XIV.

This Chapter, except sec. 155, does not apply to the Police in the town of Calcutta—15 Cal 595 The application of Sec. 155 to the Calcutta Police is due to the reference to a Presidency Magistrate in subsection (2) of that Section

Nothing in this Chapter applies to the Police in the town of Bombay. Even Sec 155 so far as it relates to the Police in the town of Bombay is repealed by sec 2 (1) and schedule to the Bombay City Police Act IV of 1902

154 Every information relating to the commission of a cognizable offence if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the Local Government may prescribe in this behalf.

Scope —This section enables a Station House officer to receive and record the information of the commission of a cognisable offence *outside* his station limits, though he has no power under Sec 157 to conduct an investigation—1914 M W N 382

First information —The information referred to in this section is the first information of the offence by whomsoever given The first information is that information which is given to the police first in point of time and not that which the police may select and record as first information—7 C W N 345 Thus, where upon information given by the Chowkidar of an offence, which was duly recorded in the station diary, the sub Inspector went to the Hospital to see the dying man, and took down his dying statement and filed it as the first information, it was held

that the statement of the Chowkidar, and not that of the dying man was the first information of the offence—6 C W N 921

The first information is the information given out immediately after the occurrence and reported to the Police, and not the information which has been elicited in the course of the investigation—7 C W N 345, 6 C W N 921 Any statement recorded several days after the commencement of the investigation, and after there has been some development is not only no first information, but has very little or no value at all as the original story, because it can be made to fit into the case as then developed—11 C W N 554, 16 C W N 145

An information given to a village Magistrate which it was his bounden duty to pass on to a Police Station House officer who recorded it, must be considered as having been given to the latter and recorded as first information under this section, and cannot be regarded as a statement recorded during the course of an investigation under Sec 162—28 Mad 565

A statement which is merely the reproduction by the person making it of the statement said to have been made by another person is not first information, and not admissible in evidence as such, and although the evidence given by that person who furnished the information to the informant could be contradicted by the evidence of the latter, it could not under Sec 155 (3) be contradicted by what the police recorded as the first information—8 C W N 218

Evidentiary value —The first information recorded by the police is of considerable value at the trial, because it shows on what materials the investigation commenced and what was the story then told—11 C W N 554 In every trial, it is important that it should be known to the judicial officer, what are the facts given out immediately after the occurrence and reported to the Police, and the object of the first information is to render him so acquainted For that purpose the diary in which the first information recorded as well as the memorandum, if any, made by the Police officer of what the informant said, is admissible in evidence—7 C W 345

But although the first information is a document of considerable importance which is in practice always and very rightly produced and proved in criminal trials, yet it is not a piece of substantive evidence, and can be used only as a previous statement admissible to corroborate or contradict the author of it—17 C W N 1213 A report of the commission of an offence made at a thana may be used in a criminal trial to corroborate or cross examine a witness, though such reports are no evidence of the existence of facts therein mentioned—17 A W. N. 47

Information relating to the commission of a cognizable offence given orally to an officer in charge of a Police station and reduced to writing by him under this section becomes a public document under section 74, Evidence Act, and its contents may be proved by a certified copy under Sec 77 of that Act—U B R (1892—1896) 24

“Officer in charge of a police station” —As to power of superior Police officers under this section see Sec 55. In the absence of the Sub Inspector or Head constable, a constable left in charge of a Police station cannot accept any complaint or prepare and submit the first information report of any crime reported to him, unless the Local Government shall have given him powers under section 4 (p)

Shall be reduced to writing —The information must be reduced to writing by the Police officer. Since the information under this section is required to be reduced to writing, then according to Sec 91 of the Evidence Act, the only legal proof of the terms of a complaint of an offence to the Police is the written record of the same, except where secondary evidence of its contents is admissible. It would be most unsafe, if in cases under Sec 211 I P C a police man's report of what a complaint contained could be accepted as proof of its contents, without insisting on the production of the document itself if it were in any way procurable—1 Bur S R 572

If the information be given orally, it must be recorded in plain and simple language, as nearly as possible in the informant's own words. The use of technical or legal expressions, or high flown language or of lengthy and involved sentences is forbidden—Ben Pol Code p 372. It is of the utmost importance in recording the first information, that the actual words of the complainant should be used and not an *Urdu* translation of them. The recorder should take down the complaint as it is made and not merely his own impression of what the complainant meant to say—Reg and Ord N W P, p 268

Power to question the informant —If the information whether given orally or presented in writing, be not complete in itself, the Police officer should elicit by interrogation such further information as may be necessary—Beng Pol Code p 372. See also C P Pol Man p 147

“Shall be signed” —The informant's statement when complete should be read over to him and he must sign it. The report should show that this has been done. In “heinous cases” the statement should be read over to the informant in the presence of one or more respectable and uninterested witnesses, who should also be asked to sign it—Beng Pol Code p 372

Procedures in the case of written informations —If the information be tendered in writing, it will be endorsed with the date of presentation, and the person tendering should be required to sign it (if he has not already done so). If the written information relates to facts with which the person tendering it is acquainted, and which he is able and willing to state orally, the mere incident that a written report is presented does not make it unnecessary to take down the information from the reporter's lips. If the person who brings the written information knows nothing of the facts to which it refers, he should be required to state the circumstances under which he brought it—C. P. Pol Man p. 147.

Punishment —As to punishment for giving false information to the Police, see Secs 182, 203, 211 I P C. Even if the information is not reduced to writing under this section, the person giving the false information may be convicted for preferring a false charge under Sec. 211 I. P. C —27 Mad. 127.

A police officer refusing to enter in the Diary a report made to him concerning the commission of an offence, and making instead an entry totally different from the information given, is punishable under Sec. 177 I. P. C —20 All 151

As to punishment for refusal by the person giving information to sign the statement made by him, see section 180 I. P. C.

155. (1) When information is given to an officer in charge of a police-station of the commission within the limits of such station of a non-cognizable offence, he shall enter in a book to be kept as *aforesaid* the substance of such information and refer the informant to the Magistrate.

(2) No police-officer shall investigate a non cognizable case without the order of a Magistrate of the first or second class having power to try such case or commit the same for trial, or of a Presidency Magistrate.

(3) Any police-officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police-station may exercise in a cognizable case

Scope —As to the application of this section to the Police in the towns of Calcutta and Bombay, see preliminary notes to this chapter, above

Investigation into non cognizable cases —Under this Section, a Police officer cannot investigate a non cognizable case and cannot submit a report with reference to it, without the order of a Magistrate. If he receives information relating to the commission of a non cognizable offence, he should enter the substance of it in the diary and refer the informant to a Magistrate. If a Police officer of his own motion, as where he has seen the alleged offence committed, makes a formal report or complaint in respect of a non cognizable offence, that will amount to a *complaint* within the meaning of sec 4 (h), for there is no provision by which he can in such a case make a Police report—26 Bom 150

A Police officer who has been ordered by a Magistrate, to investigate a non cognizable offence cannot legally *delegate* the duty of making the investigation to a chief constable—Ratanlal 488

It is incumbent upon a police officer who investigates a non cognizable case under the orders of a Magistrate to keep the *diary*, for which provision is made in sec 172, *infra*—1918 P R 16

The power to *arrest without warrant* is expressly taken away by this section from the Police in the investigation of a non cognizable offence—U B R (1897—1901) 31

After the investigation is over, it is the duty of the Police to submit a report to the Magistrate under sec 173. Where information was given to the Police of the commission of a non cognizable offence, and the Magistrate ordered the Police to investigate the case and report, and the Police without submitting any report instituted proceedings against the informants under sec 211 of the I P C for giving false information, and the accused were convicted, it was held that the conviction was illegal, the Police should not be allowed to prosecute without submitting the report of the original case to the Magistrate and without having that case disposed of by the Magistrate—17 Bom L R 69

Magistrate's power to direct investigation —In 12 Bom 161, it is laid down that this section is conversant only with the powers of Police officers, but it confers no power or authority on Magistrates to direct a local investigation by the Police or call for Police report. It is section 202 which enables the Magistrates referred to therein to direct a local investigation by the Police. See also 20 Mad 387. But in 8 Bom L R 589, it has been held that a Magistrate is empowered under sub section (2) of this section to refer a matter to the police for investigation and report. So also in 6 M I T 259, the Magistrate was held

competent to order an investigation without first taking cognizance of the offence under sec. 190 *infra*

156 (1) Any officer in charge of a police-station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial.

(2) No proceeding of a police-officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate

(3) Any Magistrate empowered under S. 190 may order such an investigation as above-mentioned.

Scope—The reference to Chap XV in this section does not limit the application of this section to offences only, but the investigation may extend to cases within the scope of sec 55 *supra*—13 A-W N. 12.]

Who can direct investigation—This section only empowers the Magistrate to direct investigation, and a Court of session has no power to do so—1910 P. R. 11.

Delay in investigation—If there is delay in the investigation by the Police, it is the duty of the committing Magistrate, and failing him, of the Sessions Judge, to inquire fully into the circumstances of the delay, and to consider its bearing on the prosecution story—2 Bom. L. R. 1092

157. (1) If, from information received or otherwise, an officer in charge of a police-station has reason to suspect the commission of an offence which he is empowered under S. 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police-report, and shall proceed in person, or shall depute one of his subordinate officers *not being below such rank as the Local Government may by general or special order prescribe in this behalf* to proceed to the spot, investigate

Procedure where cognizable offence suspected.

the facts and circumstances of the case *and if necessary to take measures* for the discovery and arrest of the offender :

Provided as follows :—

(a) when any information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police-station need not proceed in person or depute a subordinate officer to make an investigation on the spot ,

Where local investigation dispensed with.

(b) if it appear to the officer in charge of a police-station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

Where police officer in charge sees no sufficient ground for investigation.

(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub-section (1), the officer in charge of the police-station shall state in his said report his reasons for not fully complying with the requirements of that sub-section, *and in the case mentioned in clause (b) such officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the Local Government, the fact that he will not investigate the case or cause it to be investigated.*

Change —The italicised words have been added by sec 32 of the Criminal Procedure Code Amendment Act, 1923

"*Not below such .. . behalf*" —This provision did not exist in the Bill of 1914, but the Select Committee which sat on the Bill in 1916 added the words " not below the rank of a *Sub Inspector* " This amendment, however, did not meet with the approval of the Joint Committee and they made the present amendment "In view of the general objection to the amendment which confines investigations to officers not below the rank of sub inspector, we have made an amendment which enables Local Governments to specify a lower rank. We recognise that police work in some provinces might be severely hampered by the above restriction"—*Report of the Joint Committee (1922)*

'*And if necessary to take measures*' —These words have been substituted for the words " and to take such measures as may be necessary. "

"This amendment makes it clear that the Police have a discretion in arresting a person accused in a cognisable case"—*Statement of Objects and Reasons* (1914)

'*And in the case investigated*'—"This amendment provides that if the Police do not investigate a complaint, the complainant shall be informed to that effect"—*Statement of Objects and Reasons* (1914)
The words "in such manner as may be prescribed by the Local Government" have been added on the recommendation of the Select Committee of 1916.

Secs 154 and 157—Whereas every information covered by the former section must be reduced to writing as provided in that section, it is only that information which raises a reasonable suspicion of the commission of a cognisable offence within the jurisdiction of the Police officer to whom it is given, which compels action under the latter section although of course a report would be sent to the Magistrate—*Punj Cir Chap XLV*, page 171

"From information received"—These words refer to the information given in Sec 154—14 C W N 326, 1914 M. W N 382

Investigation of offence outside jurisdiction—There is nothing in this section to prevent the police of one police station from conducting an investigation within the jurisdiction of another police circle. Therefore where the police Inspector of T circle during the investigation of a burglary sent some constables to the house of the accused situate in another police circle and the constables locked the house in question and kept guard of the house, it was held that the Inspector of T circle did not act *ultra vires*—1915 P R 12

Report—The report required by this section is the first report of the offence which an officer in charge of a Police station is required to make to a Magistrate as soon as he receives information of an offence and before entering on its investigation. It is to be made direct to the Magistrate in order that he may have an early information and be in a position to act, if necessary, under Sec 159—*Bombay Police Manual*, page 91

A report under this section is necessary for taking proceedings under Sec 159—4 C W. N 351. The Police report under this section would give the Magistrate jurisdiction to enter upon an inquiry. But he may determine as he thinks fit, either to take no further steps or to take cognisance of the offence under Sec 190 (1) or to proceed under Sec. 203—2 Weir 119

Failure to send a report as required by this section is a serious breach of duty which may lead to failure of justice—4 S L R 38

Report, whether a complaint—A report submitted in the usual way under secs 157 and 173 is not intended to be and could not be a complaint within the meaning of Sec. 195—6 O C 1

Report, whether public document—Right of accused to get copies before trial—The report made by a Police officer in compliance with this section is not a public document within the meaning of sec 74 of the Evidence Act, and consequently an accused person is not entitled before trial to have a copy of such report—20 Mad 189

158 (1) Every report sent to a Magistrate under S 157

Reports under S. 157 how submitted shall, if the Local Government so directs, be submitted through such superior officer of police as the Local Government, by general or special order, appoints in that behalf

(2) Such superior officer may give such instruction to the officer in charge of the police station as he thinks fit, and shall, after recording such instructions on such report, transmit the same without delay to the Magistrate

159 Such Magistrate, on receiving such report, may

Power to hold investigation or preliminary inquiry direct an investigation or, if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of, the case in manner provided in this Code

Magistrate's power to hold investigation or inquiry—An inquiry can be made under this section only on a police report submitted within the terms of section 157, i e a preliminary report made before the completion of the police investigation or inquiry but if the report is submitted *after investigation*, the Magistrate is not empowered to act under this section Thus where information was laid before the police charging a person with criminal trespass into a house with intent to have improper intercourse with a female therein, and the police reported that they did not believe that the object was to commit the offence stated but that they were not disinclined to believe the charge of trespass, it was held that as the report was made after investigation into the offence, the Magistrate had no jurisdiction to act under this section—4 C W N 351

The inquiry which a Magistrate is competent to hold under this section is a *preliminary* inquiry Therefore where a report of the commission of an offence had been made by the police *after full inquiry*

ment may, by general or special order, prescribe in this behalf, acting on the requisition of such officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case

(2) Such person shall be bound to answer all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture

Change —The italicised words have been added by sec 33 of the Criminal Procedure Code Amendment Act (XVIII of 1923) This amendment is similar to that made in section 157 (1)

Scope —The provisions of this section should not be utilised in any but "*heinous cases*" Heinous cases include cases triable exclusively by a [Court of Session and those cases in which special diaries are submitted through the Magistrate either to the Commissioner only, or both to the Commissioner and to the Deputy Inspector General or Inspector General of Police—Beng Pol Code, p. 437

Examination of accused before arrest —When a police officer has evidence before him, upon which he is bound to arrest a person, he should not, preliminary to his arrest, obtain a statement from that person professedly under this section and reduce it to writing—27 Cal 295

Statements of witnesses —*Not privileged under sec 172* —Where a Police officer making an investigation under this section took statements from the persons who were afterwards called as witnesses, the accused person would be entitled to call for and inspect such documents and cross examine the witnesses thereon, as such statements would not amount to a portion of the diary referred to in sec 172—16 Cal 610, 20 Cal 642, 16 A W N 793, 9 C P L R 33 U B R (1897—1901) 29. *Contra*—19 All 390, 16 All 207

Statements not the property of Police —There is no prohibition against any person present at the time when depositions are being taken or confessions made, to take down in writing what either a prisoner or a witness says—10 Cal 256

Recording of statements —Statements made by a witness to a police officer under this section during an investigation may be reduced to writing But it is not obligatory on the Police officer to reduce to writing any statement made to him He may do so only if he likes—11 Bom H C R 120 The words 'and may reduce into writing any statement

made by the person so examined' which occurred in the Code of 1882 at the end of the first para have been omitted

The statements of witnesses should not be recorded in the special diary mentioned in sec 172—33 Cal 1023

It is not necessary that the statements of witnesses recorded under this section should be in the form of alternative question and answer. It is enough if the statement so recorded is substantially an answer to questions put to the witnesses—15 All 11, 1896 P R 7

The statements need not be signed by the witnesses. But there is nothing illegal in police officers obtaining the signature of witnesses to a statement under this section to authenticate his record of such statement, but there is nothing to compel them to sign it—15 All 11

Privilege of witnesses —A statement made by a witness in the answer to the question put to him by a police officer in the course of an investigation under this section is privileged, and cannot be made the foundation of a charge of defamation—16 Mad 235 nor can he be made liable in an action for damages for any words spoken during such investigation—28 Cal 794

Witness not bound to speak the truth —Under the Code of 1882 a witness was bound to answer *truly* all questions put to him under this section, but the effect of the omission of the word 'truly' from the Code of 1898 has been to do away with the legal obligation to speak the truth (10 Bur L T 259). Therefore witnesses cannot be prosecuted for giving false evidence under this section—23 Mad 544, 9 Bur L T 203. The Select Committee (1898) observed —'It seems to us unfair that a man should be liable to be convicted of giving false evidence on the strength or by the aid of a statement supposed to have been given to a Police officer, but which is not given on oath, which he has not signed, and which he has had no opportunity of verifying; such statement may be hurriedly taken down as rough notes, the police officer is not trained in taking evidence, and the notes are often faded out by another officer. They bear no resemblance to depositions and ought to have no weight as such attached to them. The provisions of secs. 202 and 203 of the Penal Code appear to us to afford a sufficient safeguard against false information

This change in the law supersedes the following cases decided under the Code of 1882 or earlier Codes —10 Cal 405, 5 C L R 235, 20 W R 41, 8 Bom 216, 11 Bom 659 15 All 11, 1896 P R 7

Since a person making a statement under this section cannot be said to "give information" with the meaning of section 182 I P C he cannot be prosecuted under that section for giving false information if the stat-

ment made by him be false—1914 P W R 35, nor under section 211 I P C—31 Mad 506

Refusal to answer questions —Under this section, a person answering questions put by a police officer is not bound to answer truly. Therefore a refusal to answer such questions is not punishable under sec 179 I P C—1 WEIR 111, 23 Mad 544, 1908 P R 27, 6 S L R 277

Sub section (2)—Incriminating questions —Under this section a witness is not bound to answer questions put to him by a police officer, the answer to which would have a tendency to expose him to a criminal charge—Ratanlal 518, Ratanlal 488. A person examined under this section by the police with respect to an offence with which he may himself be charged and convicted is not bound to speak the truth, and in such a case a conviction for giving false evidence would be illegal—Ratanlal 619

162 (1) No statement

Statement to
police not to be
signed or admitted
in evidence

made by any person to a police-officer in the course of an investigation under this Chapter shall, if taken down in writing be signed by the person making it nor shall such writing be used as evidence. Provided that, when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, the Court shall, on the request of the accused, refer to such writing, and may then, if the Court thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof and such statement may be used to impeach the

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made by any person to a police officer in the course of an investigation under this Chapter shall, if reduced into writing be signed by the person making it, nor shall any such statement or any record thereof of whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made

Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been

the credit of such witness in manner provided by the Indian Evidence Act, 1872

reduced in writing as aforesaid, the Court shall on the request of the accused refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

Provided further, that if the court is of opinion that any part of any such statement is not relevant to the subject matter of the inquiry or trial, or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused.

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made by any person to a police-officer in the course of an investigation under this Chapter shall, if reduced into writing be signed by the person making it, nor shall any such statement or any record thereof whether in a police-diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made

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any statement falling within the provisions of S. 32, clause (1), of the Indian Evidence Act, 1872.

Change.—Sub-section (1) of this section has been thoroughly redrafted by sec. 34 of the Criminal Procedure Code Amendment Act (XVIII of 1923).

Legislative history of the section and reasons for the change—
 "The amendment of section 162 has been discussed at great length by the Committee. It has been the subject of amendment before, and of constant difficulty in the Courts. We therefore propose to recast the section, and we think that a note as to its previous history will be instructive

'Under the original Code of 1861 (section 145), a Police officer could examine potential witnesses and reduce their statements to writing, but the *writing* was not to be part of the record or used as evidence. The Code of 1873 maintained the above provisions, merely adding (section 119) that no person when examined by the Police should be bound to answer incriminating questions. The only material change made by the Code of 1882 (section 162) was that, instead of the provision that the statement when so reduced to writing should not be used as evidence it was provided that no statement made by a witness if reduced to writing should be used as evidence *against the accused*, thus making it clear that the provision in question was intended for the benefit of the accused

"The new section did not lay down in terms that the accused might not use the written record of a witness' statement for the purposes of his defence, and indeed it rather suggested that he was entitled to do so. Accordingly cases occurred in which the accused demanded to see the statements which the police had taken down, in order that he might use for the purpose of his defence, anything that appeared therein to his advantage, and the Calcutta High Court ruled that he was entitled to do so. The Allahabad High Court, on the other hand, held that the writings in effect formed part of the police-diary, and were therefore privileged from inspection, and this was the position which stood to be dealt with when the Amending Act of 1898 was under consideration. There was evidently a good deal to be said on both sides as will appear from the report of the Select Committee (1898) on the Bill which is quoted *in extenso* below.—

"* * The question involved (namely, whether the accused is entitled to inspect statements taken down by the police under section 161) is full of difficulty. In the first place, it is essential

in the interests of public justice that the sources of police information should be kept secret. If the names of informers or detectives and the nature of their information be disclosed, the detection of crime would be seriously crippled. In the second place, it is unfair to a witness that his evidence should be discredited on the strength of an alleged statement made to a policeman, which he may have had no opportunity of verifying or correcting. Such statements must necessarily be often taken down hurriedly and may be incorrectly copied out. They are not taken down as depositions, or with regard to the rules of evidence, but merely to aid the police in the course of their investigation. But, in the third place, it may be most important for the accused to show that a witness called for the prosecution is telling a story substantially different from that which he told when first questioned by the police. We have endeavoured to reconcile these conflicting interests by reverting to the language of the Codes of 1861 and 1872, and adding a proviso compelling the Court, on the application of the accused, to refer to such statements, and then empowering it in its discretion to allow him to have copies of them. We then provide for the mode in which these statements are to be used. It is clear that a witness ought not to have his credit impeached on the strength of a statement alleged to have been made to a policeman, unless and until it is shown that he has made that statement.¹

¹ The result was not altogether a happy one. It will be noticed that the section deals mainly with the *writing*, and enacts that it shall not be used as evidence, with a proviso that the Court may in its discretion direct the accused to be furnished with a copy of it—presumably only in order that the accused may know that there is something in the writing which may help *his defence*—and goes on to say that the statement (*i.e.*, what the witness said to the Police officer) may be used in the ordinary course to impeach the credit of the witness, obviously implying that for this purpose it must be duly proved.

“It seems clear that all that the amendment of 1893 intended to effect was to make it clear that the accused had no right to call for or see the record of any statements taken down by the police under section 161, unless the Court thought that in the interests of justice he should be allowed to do so. It did not purport to deal with, and has left untouched, the further question whether or not a statement made by a witness under section 161, as apart from the written record of the statement, might be used by the prosecution for the purpose of corroborating one of their

witnesses under section 157 of the Evidence Act, and this is at all events one of the principal difficulties with which we have to deal now

"The re draft of the section which we propose will make it clear that the statements taken down under section 161 (and not merely the written records of such statements) are not to be used in any way or for any purposes except as allowed by the proviso. Having regard to the fact that the making of such statements is compulsory under section 161, and to the way in which, and the circumstances under which, they are usually recorded, we do not think that they are of any corroborative value when the witness merely repeats the same statement in Court, and that they ought not therefore to be allowed to be used for the purpose of corroboration under section 157 of the Evidence Act. If the really material fact to the prosecution is that a statement was made to the police on a particular date or at a particular place, this fact will of course still be provable in the ordinary course, and it will be open to the Courts or to a jury to make any proper deduction from this fact and the action which was taken on it. The amendment will also, we think, make it clear that if the accused wishes to rely on anything in the previous statement of a witness to the police, of which he has been allowed by the Court to have a copy, he will have to prove it in the ordinary way. If the witness admits this in cross examination, it will of course be sufficient, if he denies the contradiction, and the Police officer who took it down is called by the prosecution, the previous statement of the witness on the point may be proved by him, if he is not called by the prosecution, the Court would no doubt itself in most cases call him, or if the accused is calling evidence in support of his defence, it may be worth his while to call the Police officer himself. But it is clear that unless the previous contradictory statement is proved in some way in accordance with law, it ought not to depreciate the witness's statement on oath. It will be observed that under our amendment, if any part of the previous statement of the witness is used for the purposes of cross examination by the accused, any other part of it may be used by the prosecution within the proper limits of re examination. This is we think, the only way in which the previous statement ought to be allowed to be used by the prosecution."—*Report of the Select Committee of 1916*

Use of statement —Prior to the present amendment, a distinction was drawn between *writing* and the *statement* embodied in the writing—36 Cal 281, and the result was that the *writing*, i.e. the document containing the statement could not be used as evidence against the accused, but the *statement* could be proved against him—1886 P R 15, 39 Bom 58. In 32 Bom 111 it was remarked that the distinction between the *writing* and the *statement* was a distinction of form rather than that of

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The statement cannot be used to make up for the deficiency in the evidence of the prosecution witnesses—*Katanal* 915, 25 Cal. 148.

A statement taken from an accused person under this section in the course of the police investigation is no evidence against him and he ought not to be made to sign it—1917 M. W. N. 575.

The statement must be proved before it can be used to impeach the credit of the witness—10 Ilus. L. T. 259.

First Proviso—Scope—The proviso deals with one case and one case only, the case of witnesses called for the prosecution, whose statements have been taken down in writing as aforesaid. And the only con-

cession it makes to the accused is to allow him, upon his request, and subject to the Court's discretion (under the second proviso) to have access to a copy of the recorded statement, and thereupon to use it for one purpose and one purpose only, *viz*, to break down the evidence of the prosecution witnesses already standing against him. On the face of it, the proviso does not cover the case of a witness *for the defence*, whose statements may have been recorded by a policeman, nor allows the prosecution to impeach the credit of such a witness by examining him upon any written statement he may have made to the police—32 Bom 111 15 All 25, U B R (1918) 84

Right of accused to get copy of statement—Under the first proviso as it stood before the present amendment, the words 'may if the Court thinks it expedient' (see the old section cited parallel) show that the accused was not entitled, as a matter of right, to obtain access to a copy of the written statement. His right to obtain such copy was left to the discretion of the Court—32 Bom 111, 16 All 207. The accused could get copy only if the Court thought it expedient in the interests of justice to furnish him with such copy—33 Cal 1023, 26 M L J 182

Under the present law the words "*shall direct*" would seem to give the accused a *right* to obtain the copies. But such right has again been curtailed by the second proviso.

The application to get a copy of the recorded statement must be made at the time when the prosecution witness, whom it is desired to test by reference to his recorded statements, appears on the box. But if after all the prosecution witnesses have been examined the defence applies to the Court to summon the Inspector of Police to appear with his diary, the application may be refused. But even in such a case the Court ought to send for and peruse the statements recorded in the diary and if on such perusal it thinks that it would be expedient in the ends of justice (and that otherwise a gross miscarriage of justice may result) to allow the accused to use such statements, it would be open to the Court to furnish the accused with a copy of the statements even at such a later stage and recall the witnesses and permit cross examination—33 Cal 1023

Where the accused was furnished with materially inaccurate copies of the statements of a prosecution witness recorded in the police diary and on discovering the mistake he applied to have that witness recalled for the purpose of re cross examination in order generally to impeach his credit, but the Court refused the application, *held* that the accused was entitled to have the witness recalled, and the Court committed an error of law in refusing the application—21 Cr L J 289 (Pat)

Second proviso.—This proviso did not occur in the Bills of 1914 and 1921 nor in the Reports of the Committees, but was added during the Debate in the Assembly. It has been noted above that the first proviso removed the discretion of the Court to grant copies of statements to the accused and made it *obligatory* on the Court to show such statements to the accused to help him in his defence. As soon as that proviso was passed, Government viewed it with grave concern and apprehended that the proviso would make the prosecution of an accused person most difficult and would hamper justice in as much as a statement made before the police by a witness might contain such highly important matter that its disclosure to an accused might be prejudicial to the State. The Government therefore strenuously opposed the proviso, and Sir Henry Moncrieff Smith moved for its deletion, leaving the whole section unamended. Mr Rangachariar and other non official members opposed the motion and said that by passing the proviso they had done nothing but to give the accused fair justice, grant him a right which had been denied to him for so long, and put a stop to what amounted to secret trial, if there was any confidential matter, it might be entered in another diary by the investigating police officer.

The official members maintained that the disclosure of the full statement would in the majority of cases be harmful. It contained the sources of police information and also more than was involved in the case of the accused. For instance if a dacoit was caught, a witness might give evidence which might lead to the detection of other members of a gang. Would it not be harmful to the interests of the State to disclose such evidence in full to an accused? The recording of evidence in separate diaries would be dangerous because it would result in an incomplete statement and the Magistrate would not have the benefit of the police investigation as a whole.

A hot debate then ensued and both sides were equally uncompromising. At last Sir Henry Stanton, who disagreed with the view of the Government, suggested that if the Government could propose an amendment which while granting the above right to the accused also provided safe guards against the disclosure of the contents of a statement which it might be prejudicial to the State to reveal, the House would accept such a compromise.

The second proviso is the result of this compromise. See the Debates of the Legislative Assembly, February 15, 1923.

Subsection (2) —*Dying declarations* —The dying statement of a deceased must be taken in the presence of the accused person; if not so taken, the writing cannot be admitted to prove the statement.

made. The statement may however be proved in the ordinary way by a person who heard it, and the writing may be used for the purpose of refreshing the witnesses' memory—8 Cal 211, 6 C W N 921, 1886 P R 13

It is advisable, where a dying declaration is elicited by questions, to set out the questions and answers, and if possible it should be taken in the presence of the accused who should then be allowed to cross examine if he likes—6 C W N 72

Where the document containing the dying declaration was not signed by the deponent, and the Police officer was not bound by law to take it down in writing, *held* that the proper method of proving the oral statement of a dying man was by the oral evidence of any person who heard it, that person being allowed to refresh his memory by reference to the notes he made or read at the time—10 N L R 19

163 (1) No police-officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in the Indian Evidence Act, 1872, Section 24

(2) But no police officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will

Person in authority —This term is not defined in the Act. But it must not be used in any restricted sense, so as to mean only a person who has control over the prosecution of the accused. The test would seem to be, whether the person had authority to interfere with the matter, and any concern or interest in it would be sufficient to give him that authority—9 B H C R 358

The following are persons in authority —Honorary Magistrate—1 W R 24, a Magistrate or Sessions Judge recording a confession—2 All 260, 10 Cal 775, Village Magistrate—26 Mad 38, Police Patel—3 Bom 12, Panchayitdar—9 C W N 474 11 C W N 904, a travelling auditor of a Railway company is a person in authority as regards one of its booking clerks—9 B H C R 358

Inducement, threat or promise —Section 24 of the Evidence Act runs thus —

‘A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to

have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority, and sufficient in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

"All oppression and trickery in regard to obtaining confessions are to be avoided by the Police under pain of the severe penalties, and the practice of employing private individuals to worm out confessions from accused persons is strictly prohibited—*Mad Pol Man* p 95

An admission obtained from a prisoner by persuasion and promise of immunity by the Police ought not to be received in evidence—9 W. R. 16

Instances of inducement, etc.—"I will get you released if you speak the truth"—8 W. R. 15, 1882 P. R. 8, 9 W. R. 16, "If you speak the truth, we would speak to the constable and arrange"—26 *Mad* 38, "You had better tell the truth"—10 *Cal* 775, 1 B. L. R. O. C. 22, "You had better pay the money than go to jail and it would be better for you to tell the truth"—9 B. H. C. R. 358, "Tell me what you know about it if you will not, I can do nothing for you, and I will send for the constable"—U. B. R. (1897 1901) 147, "If you confess the truth nothing will happen to you"—5 N. W. P. H. C. R. 86, "If you confess to the Magistrate, you will get off"—1 W. R. 24, "Tell me what happened and I will take steps to get you off"—3 *Bom* 12, "It is of no use to deny it, for there are the man and the boy who will swear that they saw you do it"—U. B. R. (1897 1901) 147

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commencement of the inquiry or trial.

(2) Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in S 364 and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried

(3) No Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and, when he records any confession, he shall make a memorandum at the foot of such record to the following effect —

any statement or confession made to him in the course of an investigation under this Chapter or at any time afterwards before the commencement of the inquiry or trial

✓ (2) Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in S 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried

(3) *A Magistrate shall before recording any such confession explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and no Magistrate shall record any such confession unless, upon questioning the person making it he has reason to believe that it was made voluntarily; and, when he records any confession, he shall make a memorandum*

"I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him

(Signed) A B,
Magistrate

Explanation—It is not necessary that the Magistrate receiving and recording a confession or statement should be a Magistrate having jurisdiction in the case

Change—The changes in the section as shown by the italicised words have been introduced by section 35 of the Criminal Procedure Code Amendment Act (XVII of 1923) The reasons have been thus stated

'We think that confessions and statements should not be recorded under the section by third class Magistrates at all or by second class Magistrates unless specially empowered We consider that a statutory obligation should be laid on a Magistrate acting under the section to warn an accused person about to make a confession that the same may be used against him, and we think that the certificate prescribed by sub section (3) should record the fact that the warning had been given'—*Report of Joint Committee (1922)*

at the foot of such record to the following effect —

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him

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Magistrate

Explanation—It is not necessary that the Magistrate receiving and recording a confession or statement should be a Magistrate having jurisdiction in the case

Object of section —The object of Police proceedings is to collect information as a preliminary step to the production of evidence in judicial proceedings against an accused person. For this purpose, any person may be examined and any statement may be reduced to writing by the Police. But no statement made to the Police can be used in evidence against the accused. To these provisions the present section seems to be supplementary. The Magistrate may prepare, what the Police may not, a record of any statement, be it a confession or not, which is made to him before judicial proceedings commence—1893 P R 2

This section does not enable a police officer who has obtained a statement, incriminating the accused, made by some person, to send such person to a Magistrate practically under custody, to have him examined and his statement recorded before the judicial inquiry or trial, for fixing him down to that statement in the subsequent judicial proceedings—27 Cal 295

Scope of section —This section under the old law did not apply to the Police in the town of Calcutta. Therefore it did not apply to a statement made by a person in custody to a Magistrate in Calcutta in the course of an investigation made by the Police in the town of Calcutta—15 Cal 595. Nor did this section apply to the town of Bombay—21 Bom 495. The present section applies to presidency towns, by reason of the reference to Presidency Magistrates at the beginning of the section.

Native State —A confession made to a Magistrate of a Native State who duly recorded and certified the same according to the provisions of this Code would be admissible in evidence in a British Court—1909 P R 2, 22 Bom 235, 12 All 505. In 1907 P R 8 it was held, however, that a confession so recorded by a Magistrate in a Native State is not entitled to the same weight as a confession recorded by a British Magistrate in strict compliance with the terms of this Code and Courts should hesitate to convict the accused upon such a confession standing alone. See also 2 Weir 125, which holds that a confession made before a Foreign Court even if it is certified according to the provisions of this section cannot be used in evidence, unless it is sworn to like confessions made to private individuals. See also 16 Bom L R 261.

A Magistrate having jurisdiction in a district in British India cannot record a confession in a place in a Native State in connection with an offence committed in his district—19 A L J 355.

Who can record statement or confession —The power to record statements and confessions under this section is given to Magistrates not being Police officers. Magistrates who are also police officers (*e.g.*

patels in Bombay) are not competent to record statements or confessions—17 Bom 485 So also Police officers having magisterial powers have no power to record statements—1 Cal 207

An Honorary Magistrate, who is a member of an independent Bench with *third class* powers, cannot record a confession or statement—29 Cal 483 The ruling in 3 P L J 298 according to which a Honorary Magistrate with third class power is able to record a confession is rendered obsolete by the present Amendment

A Magistrate who directs the police investigation is not incompetent to record a statement or confession under this section. On the other hand, it is the duty of the Magistrate who directs a police investigation or holds a preliminary inquiry under this Code to record statements under Sec. 164, it is his duty to see that the accused confesses voluntarily, and to record his confessions truly—5 V L R 31

A confession or statement under this section may be recorded by a Magistrate who afterwards conducts the inquiry or trial—37 Cal 467 A Magistrate is not debarred from recording the confession of an accused person under this section merely because it may be afterwards his duty to hold a preliminary inquiry—Ratanlal 121 A confession freely made to a Magistrate and recorded under this section is not inadmissible if the Magistrate thought proper, or if it so happened that he was the only Magistrate to take the case and commit it to the Sessions Court—3 C W N 387 The decision in 5 Cal 954 is no longer good law

'May record'—The Magistrate may record the statement or confession it is not obligatory on the Magistrate to do so. There is nothing in law to support the proposition that in order to make an oral extra-judicial confession admissible in evidence it *must* be reduced to writing. The confession may be proved by the evidence of the Magistrate—1918 P R 11, 21 Bom L R 1065 (per Hayward J, Sharp J Contra), 45 Mad 230 *Contra*—49 Cal 167 where it is held that a confession not recorded as provided by this section cannot be proved by the evidence of the Magistrate

Statement or Confession.—The word 'statement' means the statement of a witness and does not mean the statement of an accused person. This section does not provide for recording any statement of an accused person other than confession, the reason is that the section relates to a stage of the case, viz the Police investigation stage, at which statements of the accused which are other than voluntary confessions and which are to be elicited by his examination are not intended to be obtained from him—2 C W N 702 In other words, this section provides for recording of two classes of things, viz (1) *statement* of a person who

appears before the Magistrate as *witness*, and (2) the *confession* of a person *accused* of an offence—2 Bom 643 5 S L R 174

Contra—1893 P R 2, where it has been held that the distinction that is made in this section is between statements that are confessions and statements that are not, and not between persons by whom statements of either character are made, and this distinction is made merely to prescribe different modes of recording (sub section 2) and that it is nowhere expressed or implied in the section that the statement of an accused person cannot be recorded unless it is a confession. See also 49 Cal 167 where it is laid down that under this section there can be no distinction between a statement made by an accused and a confession made by him, and that a *statement* made by an accused that he had committed a murder must be recorded as provided by this section.

When statement and confession may be recorded —A statement or confession must be recorded under this section in the course of an investigation under this chapter or at any time afterwards, but before the commencement of the inquiry or trial. Therefore where the Magistrate recorded confessions of the accused before he took cognisance of the case and before the examination of the prosecution witnesses began, it was held that the confessions were duly recorded under this section—37 Cal 467. But where during an inquiry under section 202, the Magistrate recorded a statement made by a person against whom the complaint was filed it was held that the statement cannot be regarded as having been recorded under this section because the statement was made during an inquiry under section 202, when the person was in the position of an accused person—32 Cal 1085.

Procedure —Under this section, in the course of the investigation, the Magistrate is entitled to record any voluntary statement made by the accused person, but he is not entitled to examine the accused person in respect of the facts of the case. That power is given by sec 342—5 C W N 864. Nor is the Magistrate competent to put constant questions on the deponent as though he were a witness, in order to elicit the truth out of his mouth—5 C P L R 13.

It is an improper procedure for a Magistrate during the investigation of a criminal case by himself to take the statements of witnesses on solemn affirmation in the absence of the accused, with the avowed object of proceeding criminally against the witnesses in case they should deviate from such statements in open Court—Ratanlal 66.

A Magistrate should not before recording a confession look into a police report to see what the accused had stated to the Police—9 C L J 663.

The Magistrate should not hold out any inducement. Where after the prisoner had made a long confessional statement, he was told by the Magistrate that if he stated all that he knew, he would then be examined as an approver and witness, it was held that the conduct of the Magistrate was highly improper—2 Weir 137

The Magistrate must not put any question to the accused tending to incriminate him—2 Weir 136

Nor should the Magistrate put any improper question thus—'It appears that you have committed murder, and absconded by escaping from custody, you have now come, what have you to say?' This question was held to be highly improper and the statement made by the accused thereupon was held to be inadmissible on the ground that such a statement could not be treated as voluntarily made—2 Weir 137

A statement cannot be said to be properly recorded under this section if a police officer is present at the time and is allowed to put questions to the witness—21 Cr L J 418 (Lab). It is not proper to allow the Police Officer who brought the prisoner to be present while the confession is being recorded by a Muharrir, and to suggest questions to be put to the confessing prisoner—*Cit G R & C O* page 8, 5 A W N 221

Confessions should be recorded in open Court. A Magistrate acts improperly in recording the confessions at a late hour in the night, after the accused had been subjected to interrogation by the Magistrate for a very long time—30 C L J 503. But of course the fact of the confession being recorded late at night is by itself a not sufficient ground against its voluntariness—49 Cal 573

Power to administer oath—The person making a statement under this Section is a witness within the meaning of Sec 5 of the Oaths Act, and therefore one to whom oath might be administered and a charge of perjury can be framed under Sec 193 I P C against the person making a false statement on oath under this section—16 Mad 421 28 A W N 73, 29 Mad 89. *Contra*—27 Cal 455 1893 P R 2 (per Plowden J), 10 C P L R 16

Mode of examination of accused—The proper mode for a Magistrate to examine an accused person under this section is to ask him if he wishes to make any statement or confession. If he says no, the Magistrate should not proceed to interrogate him, but if such person wishes to make any statement, the Magistrate should write down the statement or confession and ask the accused such questions as may be necessary to ascertain clearly what his meaning is—5 C P L R 13, 20 O C 136, but the Magistrate cannot examine him in respect of the facts of the case—5 C W N 864

In ¹21st Bom 495, it was held that although it was practicable to record the statement in the language of the accused, the failure to do so would not make the statement inadmissible in evidence, if the accused was not injured as to his defence on the merits by such irregularity. So also is the view taken in 4 Bom L R 785, and 20 A L J 915.

When a Magistrate is unable to record a confession in the language in which it is made, he should not employ a *Police officer* to write it down. The employment of a Police officer even as a scribe in recording a confession is objectionable—9 C L J 55.

If the statement of the accused is conveyed to the Court through an interpreter, it is not necessary that the Magistrate should record the statement in the language used by the accused, the record must be in the language in which it is interpreted—5 Cal 826.

Although the terms of sections 164 and 364 are imperative, still if the Magistrate instead of recording the confession himself employs a clerk to do so, it was held that the irregularity would be cured by sec 533 by examining the Magistrate—1909 P R 2.

Signature —The object of requiring the signature of an accused person to the record of his confession is probably to furnish a strong test as to whether the confession was voluntary and free, and to afford him a *locus penitentiae* before the completion of the record, of indicating that the confession was not voluntary or was made under improper influence—10 B H C R 166. The signature is taken as a voucher of the authenticity of the statement, and not as an admission of its correctness—9 C L J 55.

The confession of the accused, if not signed by the accused, or attested by his mark, is not admissible in evidence—10 B H C R 166, but if the accused subsequently signed the confession without objection as soon as it was noticed, the defect is cured by sec 533 by the evidence of the Magistrate as to the authenticity of the statement—9 C L J 55.

If the accused is able to write, his thumb impression will not be sufficient—32 Cal 550.

The Magistrate must sign the record of confession as well as the memorandum—3 C W N 387.

Subsection (3)—Confession must be voluntary —A Magistrate can record a confession if voluntarily made—0 O C 136. No statement should be recorded under this section unless the person making it is a free agent and voluntarily agrees to have his statement taken down—1918 P R 16. A confession not voluntarily made is inadmissible.

in evidence—2 Weir 137 Magistrates acting under this section must be affirmatively satisfied of the voluntariness of the confession, and in case of doubt they ought not to record it or give the certificate—25 Bom. 168 And the Magistrate should ascertain the voluntariness of the confessional statement, at the beginning of the statement and not at the end—2 Weir 136 In recording a confession, the Magistrate should *begin* by enquiring into the point whether the confession is voluntarily made, where a Magistrate recorded a confession of an accused without first satisfying himself as to its being voluntary, and then at the *end* of it put one comprehensive question as to the nature of the confession, it was held that he had not complied with the provisions of this section—1 Bom. L. R. 357, 15 Cr. L. J. 633 (Oudh) In 40 Cal. 873 it was held that the fact that the Magistrate instead of asking the accused about the voluntary nature of the confession at the commencement of the confessional statement asked him at the end, was merely a defect of form that did not alter the character of the confession. The present amendment of this section now makes it clear that the questioning about the voluntariness of the confession must take place *before* the recording of the confession

"It is desirable that Magistrates should act with deliberation in examining persons brought before them for the purpose of making confessions and should as far as possible, satisfy themselves that the confession is voluntary—and this not merely from the declaration of the accused, but from an attentive observation of his demeanour"—*Cal. G. R. & C. O.* page 8

The Magistrate should not be content with a few formal questions. The section contemplates that the Magistrate shall hear the confession first, without making any record, and shall then put questions to ascertain whether the confession is voluntary, and then if he has reason to believe that it is voluntary, he may record the confession, writing out in full every question put by him and every answer given by the accused and following the provisions of sec. 364. The questioning of the accused before recording a confession is a matter of substance and not of mere form, and if it has been omitted, the omission cannot be cured by any evidence under sec. 533—3 L. B. R. 173, 3 L. B. R. 213, 2 Lah. 315

"No Magistrate shall record any such confession, unless upon questioning the person making it, he has reason to believe that it was made voluntarily. It is the invariable practice of the Deputy Magistrates in the Province to ignore entirely this provision of the Code. It is considered sufficient to make use of a stock phrase which in this instance

runs "I am a Magistrate ; if you want to make any statement of your own accord, you may do so , do not make any statement which you have been tutored by others to make' and then follows the story 'of the crime without any answer whatever to the Magistrate's formula 'To my mind, a Magistrate might just as well say to the accused "*hocus focus*" or "*abracadabra*" Such phrases would be as much a compliance with the terms of S 164 (3) as any formula now in vogue What is meant by the Code is that the Magistrate should ask the accused some such question as "why are you confessing ? Are you sorry for your crime or is that some one has told you that you will gain something by a confession ?" and to refuse to proceed with the recording of the confession until he has had a satisfactory answer to his question The attention of the Magistrates has been drawn several times to this defect in the procedure, but the comments of the Court have invariably been completely ignored In my view, the Local Government should take steps to see that Magistrates understand the requirements of S 164 (3) and that if Magistrates fail to observe them, they are severely reprimanded"—per Roe J in 18 Cr L J 721 (Pat)

In order to ascertain whether the confession is voluntary, the Magistrate is bound to question the accused closely as to his motive in making a confession, and if he fails to do so, he has no jurisdiction to say that he is satisfied as to the voluntary nature of the confession—*Ibid*

No express form of question is prescribed, and the extent to which the Magistrate should question the accused must largely depend on the particular facts of each case There are cases which on the face of them attract the suspicion of a Magistrate, and there are others which do not attract any suspicion at all, and it is impossible to lay down any hard and fast rule on the subject The Court must in each case satisfy itself that the Magistrate honestly believed and took steps to ascertain that the confession was a voluntary one—4 P L T 279

When a confession made by the accused is alleged by him to have been obtained by ill treatment or other improper inducements, the Court should carefully inquire into the truth of such allegations—8 B H C. R 126 ; and it will not be presumed that it was so induced—11 B H C. R 137 , and if the Court sees any ground of exclusion mentioned in sec 24, Evidence Act (inducement, threat, promise), it may reject the confession, though the confession appeared to be voluntarily made at the time of record—1887 P R 51

Mere subsequent retraction of a confession duly recorded and certified is not enough to show that it was not made voluntarily—25 Bom 168.

The memorandum annexed to a record of confession is not a conclusive evidence of the fact that the confession was voluntarily made, so as to preclude the Court of Appeal from inquiring into the nature of the confession to see whether it was voluntary or not—9 C. L. J. 663

Confession of accused in Police custody —A confession obtained after the accused had been in custody for some time is always open to grave suspicion—9 All 528, 6 C. W. N. 380 When a Magistrate records the confession of a person who has been in police custody, he should ascertain and record the period during which the accused had been in custody, to satisfy himself whether the confession was voluntary or not—25 Bom 543 The fact and duration of Police custody has a material bearing on the question whether a confession is voluntary or not—13 C. W. N. 86t, but a confession cannot be rejected on the sole ground that the accused had been a long time in police custody—Ratanlal 720

A prisoner in police custody who is brought before a Magistrate to have his confession recorded, does not cease to be in police custody, merely because at the time of recording the confession there is no police officer in the room—Ratanlal 855. Even if the accused is in the custody of a police officer when he makes the confession, yet the confession being made before a Magistrate is not excluded from being given in evidence by anything contained in sec. 26, Evidence Act, when proved by the evidence of the Magistrate—1918 P. R. 11 (following 1881 P. R. 21)

Memorandum —A confession without a memorandum that it is voluntarily made is bad in law, and cannot be admitted in evidence—6 Bom 228, 1 Bom 219, 7 C. W. N. 220, and the want of memorandum can be cured, if at all, only by the Sessions Judge taking evidence during the trial that the accused had made the statement—5 Cal 958, 22 Mad 15

The memorandum is required only in case of confessions made by the accused. A statement of witness need not be appended by a memorandum that such statement was made voluntarily—27 Cal 295

A confession does not become unworthy of evidence, merely because the memorandum required by law to be attached thereto has not been written in the exact form prescribed—3 All 338 It is sufficient if it is in substance the same as that given in this section

If however the memorandum omitted to state that the confession was voluntarily made, it was held that the Magistrate omitted to observe a most important provision of this section, and the confession was therefore not admissible in evidence—2 Weir 140, 2 C. W. N. 702 (717), but the

defect would be cured by sec 533 if the Magistrate afterwards deposed that he believed that the confession was voluntarily made—20 A L J 915; 2 C W N 702 (714)

Under this section as now amended the Magistrate must give warning to the accused that the confession may be used against him, and the memorandum also should record the fact that the warning was given. Omission of such record will make the memorandum defective, but the defect may be cured by sec 533 if the Court on taking the evidence of the Magistrate is satisfied that the warning required was actually given—2 P L T 773

It is most advisable, although the law does not require it, that the Magistrate should record a memorandum of enquiry showing what steps he has taken to fully satisfy himself that an accused person is confessing voluntarily—2 Lah 129 The present amendment of this section has made an express provision to this effect

But the memorandum need not set forth the circumstances under which the confession was made. Thus, an omission to state in the memorandum that the accused was not in police custody at the time when the confession was made, does not make the confession invalid—Ratanlal 534

An English memorandum as required by sec 364 is not necessary in respect of a confession under this section—14 Cal 539

Refusal to make a memorandum —Where a Magistrate who recorded the confession of an accused refused to make the memorandum on the ground that the confession was not made voluntarily, it was held that under sec 533 the confession could be admitted in evidence during the trial when the Magistrate who recorded it proved that it was made voluntarily—8 O C 395 Where the Magistrate refused to make a memorandum on the ground that the accused had been in police custody for 5 days before he was produced before him, and that there was a proposal on the part of the police to treat the accused as an approver, but there was no evidence that the proposal was communicated to the accused, it was held that the ground was not a valid ground and the Sessions Judge ought to have proceeded in the absence of the memorandum to take evidence under sec 533 whether the confession was duly made—22 Mad 15

Explanation—Magistrate without jurisdiction—Power of Police officers —A statement or confession can be recorded by a Magistrate although he has no jurisdiction in the case (3 P L J 291) But a Magistrate not having jurisdiction can record the statement of a witness under this section, if the witness appears voluntarily before him, and is

not brought before him by the police—29 Cal 483 But this section will not empower a police officer to compel a witness to go to a local Magistrate not competent to deal with the case, and to get the statement recorded—Ratanlal 468 29 Cal 483 Such a course will defeat the object of sec 162, which declares that the police officer shall not record any statement made to him by a person under examination Where the police officer has reason to believe that the witness is likely to be gained over by the accused, the proper course is to send the accused and the witness to the Magistrate having jurisdiction without delay—29 Cal 483.

165 (1) Whenever an officer in charge of a police station, or a police-officer making an investigation considers that the production of any document or thing is necessary to the conduct of an investigation into any offence which he is authorized to investigate, and there is reason to believe that a person to whom a summons or order under Section 94 has been or might be issued will not or would not produce such document or thing according to the directions of the summons or order, or when such document or thing is not known to be in the possession of any person, such officer may search, or cause search to be made, for the same, in any place within the limits of the station of which he is in charge, or to which he is attached

165 (1) *Whenever an officer in charge of a police station, or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief, and specifying in such writing so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station*

(2) Such officer shall, if practicable, conduct the search in person

(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the document or thing for which search is to be made, and the place to be searched, and such subordinate officer may there upon search for such thing in such place

(4) The provision of this Code as to search warrants shall, so far as may be, apply to a search made under this section

(5) Copies of any record made under sub section (1) or sub section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence and the owner or occupier of the place searched shall on application be furnished with a copy of the same by the Magistrate

(2) A police officer proceeding under sub section (1) shall, if practicable, conduct the search in person

(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time he may after recording in writing his reasons for so doing require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the place to be searched and so far as possible the thing for which search is to be made and such subordinate officer may there upon search for such thing in such place

(4) The provision of this Code as to search warrants and the general provisions as to searches contained in Section 102 and Section 103 shall so far as may be, apply to a search made under this section

Provided that he shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost

Change —The changes in this section as shown by the italicised words have been introduced by sec 36 of the Criminal Procedure Code (VIII of 1923) For reasons see below

Sub section (1)—General search —From a comparison of the old and new sections it will be seen that prior to the present amendment, this section spoke of a *specific* document or thing which might be the subject of a summons or order under section 94 it did not authorise a *general search* on the chance that some thing might be found—38 Cal 304; 16 C W N 1078 38 All 14, 35 M L J 127 The section spoke of a particular document or thing which was necessary to the conduct of an investigation into an offence, and did not authorise a search for *arms generally*—36 Cal 433, or for stolen property generally—41 Cal 261, or for 'stolen property relevant to the case —16 C W N 1078

The present section as amended departs from the language of sec 94 and speaks of 'anything' necessary for the purposes of an investigation, thus authorising a *general search*

"Suggestions have been made that section 165 as re drafted by the Bill goes too far and that it should only permit a search to be made for something specified We think the utility of the section would be largely impaired if effect were given to these suggestions, but we have provided a safeguard by requiring that an officer acting under sub section (1) or sub section (2) *shall record in writing his reasons for making a search or requiring a search to be made* —*Report of the Joint Committee (1922)*

It should be noted, however, that in sub section (3) it is laid down that the thing shall be specified as far as possible

"Within the limits" —A Station House officer has no power to make a search beyond the local limits of his own circle—8 S L R 1, 1918 M W N 525—24 M L T 96 Such a search is illegal and resistance to such search is not an offence—13 A L J 691 If it is necessary to make a search within the limits of another police station, the procedure of sec 166 should be followed

Who shall conduct the search —Sub section (2) lays down that the officer in charge of a Police station or the investigating officer must "conduct the search in person" But this does not mean that the officer must himself make the search *ie* ransack boxes examine the

room, dig up the floor or otherwise seek for the property. Nor is it necessary that all these processes should take place under his eye. Therefore where the Inspector remained outside the house, while the actual search was being made inside by two Constables, it was held that the search was not illegal. All that the section means is that the officer should go to the spot and exercise a general superintendence over the search, in contradistinction to the cases where he is unable to go to the spot and deposes a subordinate by a written order to conduct the search in his place—23 M L J 445 (dissenting from 17 M. L J 323, where a search made by a Constable inside the house while the Inspector was seated outside, was held to be illegal as not being conducted in person by the Inspector)

⁽¹¹¹⁾ The Magistrate cannot conduct the search under this section. This section speaks of a search made by a Police officer and not by a Magistrate—36 Cal 433. The Magistrate can conduct a search only under section 103.

Sub section (2)—Order in writing.—If the officer cannot himself go to the spot he can depute a subordinate, but the deputation must be by an *order in writing*. A Constable making the search without such a written order does not lawfully exercise the power of a public servant, and resistance to such search is not an offence—7 N W P H C R 209, 6 C L J 753, 8 S L R 1, 13 A L J 691.

Subsection (4)—Necessity of Search warrant.—A subordinate Police officer may, however, without a warrant enter a house in search of a *person* who is charged with having committed a cognisable offence, but he is not empowered to enter a house, without a search warrant, in search of *property*—7 B H C R 50.

Witnesses to the search.—Prior to the present amendment it was held that the failure to call inhabitants of the locality or witnesses to the search did not make the search illegal, because the provisions of section 103 did not apply to a search under this section—23 M L J 445. This ruling is now rendered obsolete by the present sub section (4) which makes the general provisions of searches under secs 102 and 103 applicable to searches under this section.

Damages for Illegal search.—A Police officer cannot investigate into a non cognisable case without the order of a Magistrate (sec 155), nor can he make a search in respect of it, because he can make a search only in those cases which he can investigate. Therefore, a Police officer making a search into a non cognisable case without being authorised by a Magistrate is liable to be sued for damages—24 Cal 691.

But a person who assists in the conduct of a search by a Police officer entitled to make a search is not liable in damages for illegal search—42 Mad 446

Where a Police officer makes a search for specific stolen property *bona fide*, the person whose premises are searched is not entitled to damages—35 M L J 127

166 (1) An officer in charge of a police station or *a police officer not being below the rank of a sub inspector making an investigation* may require an officer in charge of

When officer in charge of police station may require another to issue search warrant

another police station, whether in the same or a different district, to cause a search to be made in any place, in any case in which the former officer might cause such search to be made, within the limits of his own station

(2) Such officer, on being so required, shall proceed according to the provisions of section 165, and shall forward the thing found, if any, to the officer at whose request the search was made

(3) *Whenever there is reason to believe that the delay occasioned by requiring an officer in charge of another police station to cause a search to be made under sub section (1) might result in evidence of the commission of an offence being concealed or destroyed, it shall be lawful for an officer in charge of a police station or a police officer making an investigation under this Chapter to search or cause to be searched, any place in the limits of another police station, in accordance with the provisions of Section 165, as if such place were within the limits of his own station*

(4) Any officer conducting a search under sub section (3) shall forthwith send notice of the search to the officer in charge of the police station within the limits of which such place is situate, and shall also send with such notice a copy of the list (if any) prepared under Section 103, and shall also send to the nearest Magistrate empowered to take cognizance of the offence, copies of the records referred to in Section 165, sub sections (1) and (3)

Scope —Prior to the present amendment, the first few lines of this section ran thus —“whenever it appears that any investigation under this chapter cannot be completed” etc , *i.e.* this section applied only to investigations *under this chapter* and gave no authority to a Magistrate to remand an accused person to custody in proceedings under Chapter VIII, in order to enable the police to arrest other persons jointly accused with him—5 Bom L R 27, 8 C W N 779, 39 Mad 928, 36 All 262. These rulings are no longer good law, because the words ‘under this chapter’ have now been omitted by the Amendment Act of 1923.

24 hours fixed by sec 61 —Having regard to the provisions of this section and sec 61 and to the requirements of justice, the intention of the Legislature is that accused persons should be brought before the Magistrate *competent to try or commit with as little delay as possible*—11 Mad 98.

“Forward the accused to the Magistrate” —Before a Magistrate remands an accused person to police custody, the accused must be produced before him—16 C W N 145. Where the accused is not brought before the Magistrate, it is illegal for him to remand the prisoner on the application of the police—1867 P R 39.

Subsection (2)—Magistrate’s power to detain —Under this section a Magistrate, on a mere perusal of the entries in the Police diaries, may from time to time authorise the detention of the accused for a term not exceeding 15 days on the whole. Thereafter he can under sec 344 by a warrant, remand the accused for any term not exceeding 15 days at a time, if there is sufficient evidence to suspect that the accused has committed an offence and that further evidence may be obtained by such remand—36 Cal 166.

The power under sec 167 is given to detain the prisoners in custody while the police make the investigation and before the inquiry, but the custody mentioned in sec 344 is quite different and is intended for under trial prisoners, *i.e.*, when the inquiry or trial has begun or is about to begin—11 Mad 98, 2, Bom 32.

Under the proviso to this subsection newly added, the power of detention is confined to first class Magistrates and second class Magistrates specially empowered.

Period of detention —The period for which a Magistrate can authorise the detention of the accused in police custody is under this section 15 days on the whole—23 Bom 32, 5 Bom H C R 31, 11 Mad 98, 19 W R 36, 1902 P R 24.

In ordering further detention when there are good reasons for it, a magistrate should invariably limit the term as much as possible to what may be necessary for the object in view—11 C. W N 354.

Subsection (3)—Grounds of detention .—Where a Magistrate orders the detention of an accused person in police custody, he must record sufficient reasons for the same—23 Bom 32, 16 C W N 145, and in recording the reasons for detention, he should note all the information that he is able to obtain on the subject—15 A W N 59

By requiring the Magistrate to record his reasons in case of sanctioning detention in police custody the law contemplates that the Magistrate should consider whether on the facts placed before him, there are good grounds for allowing such detention. There must be at least something to satisfy the Magistrate that the presence of the person arrested would, during the police investigation, assist in some discovery of evidence—11 C W N 554. The reasons which are to be recorded must be reasons showing the particular necessity which exists in each particular case for leaving the prisoner in the hands of the Police. Under no circumstances should an accused person be remanded to police custody unless it is made clear that his presence is actually needed in order to serve some important purpose connected with the completion of the enquiry—15 A W N 59

Thus, when the accused had confessed before the Magistrate and had pointed out some of the properties stolen and was waiting to do more, but was unable to do so because the police were by law unable without a special order to detain him, it was held that an order for detention should be made—11 C W N 554. If in a case into which the police are enquiring, the suspected persons have voluntarily offered to conduct the police to a place where the stolen property may be found, but such an offer cannot be carried into execution within the limited period of 24 hours, the power to detain under this section may be rightly exercised—3 N W P H C R 275

But the fact that the accused is wanted by the police for the purpose of pointing out the places through which he passed on his way to commit a dacoity, or for the purpose of obtaining his identification in the village, is not a sufficient reason for sanctioning detention—7 C W N 457. So also, it would be improper for a Magistrate to sanction the detention of a person in police custody so that he may be forced to give a clue to stolen property—3 N W P H C R 275, or on a mere expectation that he will show his guilt—1872 P R 17, or simply for the purpose of verifying his confessions recorded under sec 164—7 C W N 220

168 When any subordinate police-officer has made any

Report of investigation by subordinate police officer

investigation under this Chapter, he shall report the result of such investigation to the officer in charge of the police-station

executed it, and shall then send to the Magistrate the original with his report.

"On a day fixed"—A recognisance taken from a prisoner binding him to attend the Court should specify a particular day for his attendance—11 W. R. 47.

The police should not bind over witnesses to appear and give evidence *long after* the prisoner is brought before the Magistrate—6 W. R. 52.

Right of accused to copy of charge sheet at the beginning of trial.—A Magistrate is entitled to refuse to give the accused, at the commencement of the trial, a copy of the Police charge-sheet, which contains the whole of the prosecution evidence and extracts, if not copies, from the police diaries—19 Mad. 14.

171. No complainant or witness on his way to the Court of the Magistrate shall be required to accompany a police-officer,

Complainants and witnesses not to be required to accompany police-officer,

or shall be subjected to unnecessary restraint or inconvenience, or required to give any security for his appearance other than his own bond;

Complainants and witnesses not to be subjected to restraint.

Provided that, if any complainant or witness refuses to attend or execute a bond as directed in Section 170, the officer in charge of the police-station may forward him in custody to the Magistrate, who may detain him in custody until he executes such bond, or until the hearing of the case is completed.

Refruse of complainant or witness may be forwarded in custody.

Unnecessary restraint:—Where a witness was kept under police surveillance for about four days, it was held that there is no warrant in the law to keep a witness under such unnecessary restraint and that under such circumstances the evidence of the witness could not be accepted as given voluntarily—4 C. W. N. 49.

172. (1) Every police-officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his

Diary of proceedings in investigation.

investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

(2) Any Criminal Court may send for the police-diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court, but if they are used by the police-officer who made them, to refresh his memory, or if the Court uses them for the purpose of contradicting such police-officer, the provisions of the Indian Evidence Act, 1872, Section 161 or Section 145, as the case may be, shall apply.

Diary to be kept properly —Though Police diaries are not evidence in the case against the accused, still it is very essential for criminal trials that they should be properly kept in the manner provided by the Code, and Magistrates should enforce the observance of law in this respect—1867 P. R. 39 See also *Punj Cir.* p. 174

It is incumbent upon a Police officer who investigates a case under this chapter to keep the diary as provided by this section, and the omission to keep the diary deprives the Court of the very valuable assistance which such diaries can give, if legitimately used—1918 P. R. 16

“Court may send for diaries” —Sessions Judges should not issue a general order directing the Police diaries in all cases committed for trial to the Court of Session and in every criminal appeal, to be transmitted to them. They are only authorised to send for the diaries of cases under trial before them, if they think it necessary in such cases to peruse the diaries—19 All 390

Use of diary —

Diary not an evidence in the case —Police Diaries are not original evidence of the matters contained therein—44 Cal 876 (P. C.) ; 21 All. 159 ; 2 Weir 143 The Court should not take the facts and statements contained in the diaries as the material which would help it to come to a finding, for this would be using the diary as an evidence in the case—10 C. W. N. 600 ; nor should the Court make a summary of the contents of the diary and make it a part of the judgment, for that would also make

the statements contained in the diary virtually a part of the evidence in the case—14 A W N 155 But the diaries can be put in evidence if the persons who wrote them are called as witnesses to prove the facts contained in such reports—2 Weir 142, 3 A W N 145, 27 Cal 295

The diary may be used for the purpose of assisting the Court in the inquiry or trial, or as suggesting means of further elucidating points which need clearing up and which are material for doing justice between Crown and the accused—44 Cal 876 (P C), 19 All 390, 2 P L T 223, 14 A W. N 155, 23 Cr L J 251 (Lah), or for the purpose of seeking for sources and lines of enquiry and for the names of persons who may be in a position to give material evidence—*Ibid*

Use by Police officer for refreshing memory or by the Court to contradict the Police officer —A Criminal Court may permit the police officers who made the special diary to look at it for the purpose of refreshing his memory, or may use it for the purpose of contradicting such police officers A special diary cannot be used to enable any witness *other than* the Police officer who made it to refresh his memory by looking at it, and it cannot be used to contradict any witness other than such Police officer—19 All 390, 44 Cal 876 (P C) It is illegal to use police diaries for the purpose of contradicting the evidence of prosecution witnesses—3 A W N 37

But the accused is not entitled to insist that a Police officer should refer to the diary to refresh his memory—8 Cal 154, nor is the Judge bound to compel the witness to look at the diary to refresh his memory—8 Cal 739

The diary is permitted to be used for the limited purpose of *contradicting* the police officer, and not for the purpose of *corroborating* him—2 P. L. T 223 But where independently of the police diary wrongly relied upon by the Court below, there was ample legal evidence to corroborate the prosecution case and to sustain the conviction, the High Court in revision condoned the irregularity and refused to interfere—*Ibid*

Accused not entitled to copy of diary —Neither the accused nor his agent is entitled to a *copy* of the special diary or of any part of it His right is limited to *inspection* only in certain cases. Where the diary is used by the Court for the purpose of enabling the Police officer who made it to refresh his memory, or for the purpose of contradicting him, the provisions of sec 161 of the Evidence Act apply, and the accused or his agent is entitled to *see* (but not to get a copy) such diary and to cross-examine such Police officer thereupon—19 All 390

Contents of the Diary—Statements under sec 161 —Statements made to a police officer by a person whom he is examining under sec 161 should not be recorded in the special diary—33 Cal 1023 20 Cal 642
Contra—19 All 390

173 (1) Every investigation under this Chapter shall be completed without unnecessary delay and, as soon as it is completed, the officer in charge of the police station shall—

Report of police officer

(a) forward to a Magistrate empowered to take cognizance of the offence on a police report a report, in the form prescribed by the local Government, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case and stating whether the accused (if arrested) has been forwarded in custody, or has been released on his bond, and if so whether with or without sureties, and

(b) *communicate, in such manner as may be prescribed by the Local Government, the action taken by him to the person if any by whom the information relating to the commission of the offence was first given*

(2) Where a superior officer of police has been appointed under Section 158 the report shall in any cases in which the Local Government by general or special order so directs be submitted through that officer and he may, pending the orders of the Magistrate direct the officer in charge of the police station to make further investigation

(3) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit

judicial order dismissing a complaint which can be reviewed by the Sessions Judge under sec. 437 (now 435) of the Code—Ratanlal 531.

174 (1) The officer in charge of a police-station or some other police officer specially empowered by the Local Government in that behalf, on receiving information that a person—

Police to inquire and report on suicide, etc.

- (a) has committed suicide, or
- (b) has been killed by another, or by an animal, or by machinery, or by an accident, or
- (c) has died under circumstances raising a reasonable suspicion that some other person has committed an offence,

shall immediately give intimation thereof to the nearest Magistrate empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the Local Government, or by any general or special order of the District or Sub-divisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted.

(2) The report shall be signed by such police-officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the District Magistrate or the Sub-divisional Magistrate.

(3) When there is any doubt regarding the cause of death, or when for any other reason the police-officer considers it expedient so to do, he shall, subject to such rules as the Local Government may prescribe in this behalf, forward the body, with a view to its being examined, to

(4) *A copy of any report forwarded under this section shall on application be furnished to the accused before the commencement of the inquiry or trial;*

Provided that the same shall be paid for unless the Magistrate for some special reason thinks fit to furnish it free of cost

Change — Clause (b) and subsection (4) have been added by sec 40 of the Criminal Procedure Code Amendment Act, 1923. 'The principle change effected is to prescribe that the Police shall communicate the result of their investigation to the person by whom the first information was given' — *Statement of Objects and Reasons* (1914)

Police report — It is the duty of the Police to make a report in every investigation under this Chapter. Where the accused gave information to the Police of the commission of a non cognisable offence, and the Police obtained the authority of a Magistrate under section 155, to investigate the case, and *without making any report* instituted proceedings against the accused under section 211 I P C which ended in his conviction it was held that the conviction was illegal, in the absence of a Police report under this section— 17 Bom L R 69

There is no legal limit to the number of investigations which can be held into a crime, and when one has been completed by the submission of a report under this section, another may be begun on further information received—35 M L J 127

The report must set forth the nature of the information. A report which omits to set forth the information is defective, and a Magistrate taking cognisance of a case on such report acts illegally—37 Cal 49

On receipt of a police report under this section the Magistrate can take cognisance of the case under sec 190(b). If instead of doing so, the Magistrate proceeded to make over the case to a subordinate Magistrate for enquiry and report as though the matter were a complaint under sec 200, held that the proceedings were irregular—40 Cal 854

The report made by a Police officer under this section is not a public document within the meaning of Sec 74 of the Evidence Act, and the accused is not entitled to get a copy of the report before trial—20 Mad 189

Order to strike off case — A Magistrate's order directing a case reported to him by the Police under this section, to be struck off is not a

Magistrate may cause the body to be disinterred and examined

Jurisdiction of Presidency Magistrate —The Presidency Magistrate is not ousted of his jurisdiction to hold a preliminary inquiry into a charge of murder, because the Coroner has held an inquiry into the cause of death and has committed the accused to the High Court under sec 25 of the Coroner's Act (IV of 1871)—16 Bom 159, 31 Cal. 1 Ratanlal 540

Power to disinter corpses —A Police officer making an investigation under this section has no power to cause a dead body which has been already interred to be disinterred in order to examine it. Such power is conferred on a Coroner under section 11 of the Coroner's Act (IV of 1871) and on a Magistrate holding an inquest under the present section.

Revision —Proceedings under this section are now liable to revision by reason of the omission of subsection 3 of section 435, by the Amendment Act of 1923

But there is nothing in this section to require that a Magistrate holding an inquiry under this section is bound to make a report or come to a finding. The inquiry under this section into the cause of a suspicious death is not a judicial proceeding and where he sent a report of the result of his inquiry to his executive superior (the District Magistrate) the High Court could not call for it under sec 435—3 Cal 742, Ratanlal 843.

(2) If the facts do not disclose a cognizable offence to which Section 170 applies, such persons shall not be required by the police-officer to attend a Magistrate's Court.

Punishment :—A person who fails to attend in obedience to the order issued under this section is punishable under sec. 174 I. P. C.

It should be noticed, however, that the word 'truly' which has been omitted from sec. 161 is still retained under this section, probably through oversight; but whether retained through oversight or otherwise, the word cannot be ignored, and a person giving false answers to questions put to him is liable to prosecution for giving false evidence, under sec. 193 I. P. C. If he refuses to answer the questions, he is punishable under sec. 179 I. P. C.

It should be further noted that the obligation to answer truly all questions attaches only to the persons *summoned* by the Police officer. If a person voluntarily comes forward without any summons, and makes false statements, he cannot be prosecuted for perjury—23 Cr. L. J. 82 (Lah.).

Record of statement :—The statement of witnesses examined at the inquest may be recorded verbatim in the report—1911 M. W. N. 138.

176. (1) When any person dies while in the custody of the police, the nearest Magistrate empowered to hold inquests shall, and, in any other case mentioned in Section 174, clauses (a) (b) and (c) of sub-section (1), any Magistrate so empowered may hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police-officer, and, if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence. The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any of the manners hereinafter prescribed according to the circumstances of the case.

Inquiry by Magistrate into cause of death.

(2) Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death, the

Power to disinter corpses.

the local limits of whose jurisdiction the offence abetted was committed

(b) A charge of receiving or retaining stolen goods may be inquired into or tried either by the Court within the local limits of whose jurisdiction the goods were stolen, or by any Court within the local limits of whose jurisdiction any of them were at any time dishonestly received or retained

(c) A charge of wrongfully concealing a person known to have been kidnapped may be inquired into or tried by the Court within the local limits of whose jurisdiction the wrongful concealing, or by the Court within the local limits of whose jurisdiction the kidnapping, took place

Scope of section—Foreign territory—The Code extends only to British territory, and the present section assumes the offence therein indicated to have been committed in a local jurisdiction created by the Code. Thus, where a foreign subject in a foreign territory instigated the commission of an offence which was in consequence committed in British territory, it was held that the instigation not having taken place in any district created by this Code, the instigator was not amenable to the jurisdiction of a British Court—to B H C R 356, 1878 P R 20. When a house-breaking took place in a district in British India, and a person residing in a Native state was found to be in possession of the stolen property, *held*, that that person was not triable by the British Courts—2 Lah L J 348. The operation of this Code cannot be extended beyond British territory, so as to give jurisdiction to a British Court to try a person residing outside British India for the offence of retaining stolen property although the theft of those properties might have taken place in British India—18 C W N 1178, 9 All 523, 4 B H C R 38. In 21 M L J 441, however, it was held that a Native Indian British subject found in the Native State in possession of property stolen in British India could be tried under this section, but a certificate of the Political Agent under sec 188 would be necessary.

If, however, the contrary things happen, *ie* if the theft takes place outside British territory, and the stolen property is brought within British India, the offence of retaining stolen property may be tried in British India, although the offence of theft which was committed outside British India cannot be tried here—in Bom 186, 1 Bom 50, 6 Cal 307 (*Contra*—5 Bom 338, 2 Weir 145, where it has been held that such persons

The primary consequence should be taken into consideration in determining the jurisdiction. Thus, where an accused living in Nandyal was appointed agent for the sale of the oil of the complainant living in Madras, and when called on to account the accused failed to do so, it was held that the offence of criminal breach of trust was triable at Nandyal and not at Madras, because the firm's loss at Nandyal was a primary consequence, and the loss at Madras, the firm's head quarters where the funds were kept is a secondary one which is not sufficient to attract the operation of this section—39 Mad 576. See also 38 Mad. 639, 44 Cal 912 and 34 All. 487. But in 35 All. 29, 19 A. L. J. 69, 46 Bom. 641, 32 All. 397, 1902 P. R. 2, 1901 P. R. 24, 19 All. 111, and 38 Mad. 779, a wider interpretation has been put on the word 'consequence,' which has been taken to include such secondary consequences as loss resulting to the employer by criminal breach of trust or failure to account for moneys misappropriated at the head office of the firm; and the Court of the place where such secondary consequence ensues has been held to have jurisdiction over the offence.

Offence in Native State—Consequence in British India—See 38 Mad. 779 cited above. See the same case cited under sec. 188.

Illustrations —The illustrations are not exhaustive and to hold that all the consequences prescribed by the Legislature as conferring jurisdiction are limited to those specified in the illustrations is not justified by the language of the section—1908 P. W. R. 18. The Illustration (d) to this section must be applied with certain restrictions. The offender in that illustration must be taken to be a subject of the British Government, and a certificate of the Political Agent must be obtained under sec. 188 before he can be tried. If the offender is a subject of the Native State, he cannot be tried by the British Courts.

180 When an act is an offence by reason of its relation

Place of trial where
act is offence by reason
of relation to other
offence.

to any other act which is also an offence or which would be an offence if the doer were capable of committing an offence,

a charge of the first-mentioned offence may be inquired into or tried by a Court within the local limits of whose jurisdiction either act was done.

Illustrations.

(a) A charge of abetment may be inquired into or tried either by the Court within the local limits of whose jurisdiction the abetment was committed, or by the Court within

or retained by the accused person, or the offence was committed

(3) The offence of stealing anything may be inquired in	(3) The offence of <i>theft</i> , or any offence which includes
Stealing to or tried by a Court within the local limits of whose jurisdiction such thing was stolen or was possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen	Theft <i>theft or the possession of stolen property</i> , may be inquired in to or tried by a Court within the local limits of whose jurisdiction <i>such offence was committed or the property stolen</i> was possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen

(4) The offence of kidnapping or abduction may be inquired into or tried by a Court within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted or was conveyed or concealed or detained

Kidnapping and abduction
Change —Subsection (3) has been redrafted by sec 42 of the Criminal Procedure Code Amendment Act, 1923 but the actual change effected by this redrafting is the addition of the words *or any offence which includes theft or possession of stolen property*. We accept this clauses but would enlarge the enumeration of offences to include the possession of stolen property. This will also cover the case of extortion. See the definition in sec 41 of I P C —*Report of the Select Committee of 1916*

Scope of section —This section does not apply to the case of an offence committed by a person who is not a British subject *outside British territory*. The section is intended to regulate the jurisdiction of Courts in British India, in respect of offences committed in British India, and cannot vary or abrogate the ordinary rule that no foreign subject can be tried in British India for an offence committed *outside British India*. —28 All 372 This section only applies as between Courts of different

can not be convicted for retaining stolen property because in order to establish the offence of retaining stolen property, it is necessary first to show that the property was stolen according to the law of the forum the Penal Code, which has no operation in foreign territories, and against the provisions of which therefore no offence could have been committed. These two decisions are however no longer good law in view of the words "whether the transfer has been made or the misappropriation or breach of trust has been committed within or without British India added to Sec 410 I P C by the amending Act VIII of 1882)

Abetment —Where a person sends a letter to another through post inviting him to the commission of an offence, he is guilty of the offence of abetment as soon as the letter is received by and the contents known to the addressee, and is triable at the place where the letter is received—16 All 389

Although an abetment of an offence might have taken place outside the territorial jurisdiction of a Magistrate, yet under this section the abettor can be tried by a Magistrate within whose territorial jurisdiction the offence abetted was committed—1 Weir 155

Abetment in British India of offence committed outside British India —Where a British subject abets in British India an offence committed outside British India he may under the amended section 108A I P C, be tried in British India—24 Bom 287 In view of Sec 108A I P C the decision in 19 Bom 105 is no longer good law

Conspiracy —The offence of an attempt to murder a person in the district R in pursuance of a conspiracy entered into in district M can be inquired into and tried in either of the two districts—1917 P R 24

181 (1) The offence of being a thug of being a thug and committing murder of dacoity, of dacoity with murder of having belonged to a gang of dacoits or of having escaped from custody, may be inquired into or tried by a Court within the local limits of whose jurisdiction the person charged is

Being a thug or belonging to a gang of dacoits escape from custody etc

(2) The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received

Criminal misappropriation and criminal breach of trust

or retained by the accused person, or the offence was committed.

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| <p>(3) The offence of stealing anything may be inquired into or tried by a Court within the local limits of whose jurisdiction such thing was stolen or was possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen</p> | <p>(3) The offence of <i>theft</i>, or any offence which includes theft or the possession of stolen property, may be inquired into or tried by a Court within the local limits of whose jurisdiction such offence was committed or the property stolen was possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen.</p> |
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| <p>(4) The offence of kidnapping and abduction may be inquired into or tried by a Court within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted or was conveyed or concealed or detained</p> | <p>(4) The offence of kidnapping or abduction may be inquired into or tried by a Court within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted or was conveyed or concealed or detained</p> |
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Change — Subsection (3) has been redrafted by 'sec 42 of the Criminal Procedure Code Amendment Act, 1923, but the actual change effected by this redrafting is the addition of the words "or any offence which includes theft or possession of stolen property" "We accept this clauses but would enlarge the enumeration of offences to include the possession of stolen property. This will also cover the case of extortion See the definition in sec 410 I P, C"—*Report of the Select Committee of 1916*

Scope of section — This section does not apply to the case of an offence committed by a person who is not a British subject, *outside British territory* The section is intended to regulate the jurisdiction of Courts in British India, in respect of offences committed in British India, and cannot vary or abrogate the ordinary rule that no foreign subject can be tried in British India for an offence committed outside British India —28 All 372 This section only applies as between Courts of differen

local areas whose jurisdiction has been limited under sec 12—5 S L R 266 1 Mad 171

Thus, where a dacoity or theft was committed in a Native State, and part of the stolen property was found where it had been concealed by the accused in British territory it was held that the offence of dacoity could not be tried by British Indian Courts, although the offence of retaining stolen property may be tried by such Courts, the retaining having taken place in British territory—1 Bom 50, 10 Bom 186, 6 Cal 307 cited under sec 180 see also 1 Mad 171 Where a person escaped from lawful custody in a Native State and came into British India, it was held that British Courts had no jurisdiction to try him 'for an offence under sec 224 I P C, as it was committed out of British India—Ratanlal 870 So also where a criminal breach of trust was committed in a Native State, a Court in British India had no jurisdiction—5 S L R 266 Where the offence of kidnapping was committed out of British India, and the minor was brought into British India, a British Court had no jurisdiction as the offence was complete out of British India, even the fact that the person kidnapped *was conveyed* to British India would not give the British Court jurisdiction, because the words 'was conveyed' do not import any separate or distinct offence, where the offence was complete previous to such conveying—1901 P R 1 7 S L R 17, 20 C W N 62

Belonging to a gang of dacoits —Where a resident of a Native State was arrested in that State and was brought before a Court in British India and charged with the offence of belonging to a gang of dacoits who had committed dacoities within the jurisdiction of the Court it was held that the Magistrate had jurisdiction over the accused, as the accused was within his district at the time of the charge—1911 P R 1

"Is" —The word 'is' at the end of subsection (1) does not mean 'is of his own accord' The Magistrate has jurisdiction whether the accused has come within the local limits of his jurisdiction of his own accord or has been brought there by force (*i.e.*, under arrest)—*Ibid*

Criminal misappropriation etc —See 4 O C 376, 38 Mad 639, 44 Cal 912, 35 All 39 26 C W N 175, 19 All 111, 29 M L J 178, and 34 All 487 cited under Sec 179 Where the complainant charged the accused under Sec 408 I P C alleging that the complainant had engaged the accused to manage a branch firm at Rurki, that accounts were sent by the accused to Rawalpindi for some time but subsequently discontinued, and that on inspection of accounts it was found that the accused had made false entries in respect of certain items it was held that in as much as the allegations in the complaint referred to specific items in

respect of which the accused was charged with having committed the offence of criminal breach of trust at Rurki, the Rawalpindi Court had no jurisdiction to try the case—1915 P R 22 Where the accused was entrusted with a railway receipt for goods in one district with instructions to take delivery of the goods at their destination in another district and sell them on complainant's account, and the accused did so sell them and misappropriated the sale proceeds, it was held that the offence was triable within the jurisdiction of the Court where the goods were sold and the money was received and misappropriated It was held further that the *"property which was the subject of the offence"* in this case was not the railway receipt but the money received on sale of the goods—10 Bur L T. 50

Subsection (4)—Scope —This subsection refers only to cases of kidnapping and abduction but it does not apply to offences under Chapter XX of the I P C, e.g., enticing away a married woman Such offence is to be inquired into only in the district where the detention of the woman occurs—1918 P W. R 8=P L R 51

Kidnapping —Subsection (4) was for the first time added in the Code of 1898 Prior to 1898, it was held that the offence of kidnapping not being a continuing offence, could be tried only by the Court within the local limits of which the minor was taken out, and not by the Court within whose jurisdiction the minor was confined—3 A. W. N 164, 7 A W N 139, nor by the Court within whose jurisdiction such minor was conveyed—3 A W N 67 But these decisions are no longer good law See also 18 All 350, 19 All 109 26 All 197, 27 Cal 1041, 2 C W N 81, where it has been held that the offence of kidnapping is not a continuing offence but is complete as soon as the minor is taken out of the custody of the lawful guardian

A person kidnapped outside British India and conveyed into British territory cannot be tried by British Courts See 20 C W N 62, 1901 P R 1 and 7 S L R 17, cited above

182 When it is uncertain in which of several local areas an offence was committed, or

Where an offence is committed partly in one local area and partly in another, or

Where an offence is a continuing one, and continues to be committed in more local areas than one, or

Place of inquiry or trial where scene of offence is uncertain or not in one district only or where offence is continuing or consists of several acts

Where it consists of several acts done in different local areas,

it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

This section intends to provide for the difficulty which would arise where there is a conflict between the different areas, in order to prevent an accused person from getting off entirely because there may be some doubt as to what particular Magistrate has jurisdiction to try the case—16 Cal. 667. Where there is an uncertainty in which of two districts the scene of an alleged offence lies, sec. 182 is applicable and the offence may be tried by the Court of either district—25 Cal 858. Thus, where the accused who was a travelling agent of a firm, employed to sell goods, sold the goods, and misappropriated some of the money, and it was not possible to say exactly where the various acts of embezzlement took place, it was held that the accused was triable either at the place where the firm was situated or at one of the various districts through which the accused travelled—32 All 397.

An offence under section 134 of the Companies Act, 1913 (default in filing balance sheet) even though the Company is situate outside Calcutta, can be tried by the Presidency Magistrate of Calcutta, because the office of the Registrar of joint stock companies with whom the balance sheet is to be filed is in Calcutta—45 Cal 486

Local area —The words 'local area' mean a local area to which the Code applies, and it would not refer to a local area in a foreign country, or in a portion of the British Empire to which the Code has no application—16 Cal 667.

Moreover, the expression includes Sessions Division, District, or Subdivision, and cannot be restricted to mean the scene of an alleged occurrence only—25 Cal 858.

183. An offence committed whilst the offender is in the course of performing a journey or voyage may be inquired into or tried by a Court through or into the local limits of whose jurisdiction the offender, or the person against whom, or the thing in respect of which, the offence was committed, passed in the course of that journey or voyage.

Offence committed on a journey.

Object of Section.—The object of this section is to remove doubts and inconveniences as regards the exact locality in which the offences

alleged to have occurred in a journey or voyage had been actually committed or completed—1 M H C R 193

Offence committed on a journey —Under this section, if a person is accused of an offence committed whilst a journey or voyage is going on, he may be tried if any part of that journey or voyage during which the offence is alleged to have been committed is within the local limits of the Court's jurisdiction—1 M H C R 193 And the Courts competent to try the case of an offender in respect of an offence committed in a journey are the Courts through or into the local limits of whose jurisdiction the offender in the course of the journey passed—1 C. L. J 334

But this section is applicable only when the journey or voyage is *continuous and uninterrupted*. Therefore, where an offence was alleged to have been committed by the accused in the course of a journey from Bombay to Howrah, but in fact took place between Bombay and Allahabad, at which place both the complainant and the accused broke the journey, and then proceeded separately by different trains to Howrah, it was held that the journey from Bombay to Howrah not being continuous, the Magistrate at Howrah had no jurisdiction to try the offence—21 W R 66 Where a guard of a train going from Coimbatore to Madras was found drunk and detained at Arkonam on the way, but he broke away, got into train and arrived at Madras, it was held that the journey must be deemed to have been broken at Arkonam, and the offence (of being drunk under sec 27 of the Railways Act) could not be tried at Madras—1 M H. C R 193

But any *short stoppage* in the course of a journey does not break the journey. Thus where some articles were missed from a boat during a halt at S in the course of a journey to C it was held that the journey would not be deemed to have been broken by the halt at S and that the offence of theft could be tried at C—25 W R 45

Voyage on high seas —This section applies only to the trial of offences committed in British India. The words 'journey or voyage' do not include a voyage on the High Seas, or in foreign territory, but are confined only to a voyage or journey within the territories of British India—5 Mad 23

But in *Ratanlal 181*, where the accused and the complainant sailed from Bombay to Honawar, and during the voyage the accused threw a box of the complainant into the sea, it was held that the Magistrate at Honawar through whose jurisdiction the accused passed during the voyage had jurisdiction to try the offence of mischief (although it was committed on the high seas, about 9 miles off from the coast)

184 All offences against the provisions of any law for the time being in force relating to Rail

Offences against Rail-
way Telegraph Post
Office and Arms Acts

ways, Telegraphs, the Post Office or Arms and Ammunition may be inquired into or tried in a presidency town, whether the offence is stated to have been committed within such town or not

Provided that the offender and all the witnesses necessary for his prosecution are to be found within such town

185 Whenever any doubt arises as to the Court by which any offence should

High Court to
decide in case of
doubt district
where inquiry or
trial shall take
place

under the preceding provisions of this chapter be inquired into or tried, the High Court, within the local limits of whose appellate criminal jurisdiction the offender actually is, may decide by which Court the offence shall be inquired into or tried

185 (1) *Whenever a question arises as to which of two or more Courts subordi*

High Court to
decide in case of
doubt district
where inquiry or
trial shall take
place

nate to the same High Court ought to inquire into or try any offence it shall be decided by that High Court

(2) *Where two or more Courts not subordinate to the same High Court have taken cognizance of the same offence the High Court within the local limits of whose appellate criminal jurisdiction the proceedings were first commenced may direct the trial of such offender to be held in any Court subordinate to it, and if it so decides all other proceedings against such person in respect of such offence shall be discontinued If such High Court, upon the matter having been brought to its notice, does not so decide any*

other High Court within the local limits of whose appellate criminal jurisdiction such proceedings are pending may give a like direction, and upon its so doing all other such proceedings shall be discontinued

Change —This section has been re-drafted by sec 43 of the Criminal Procedure Code Amendment Act For reasons see below

Subsection (1)—Nature of the doubt —The decision of the High Court can be sought not only where the doubt arises as to whether one Court or another has jurisdiction but also where the doubt is on the point whether the choice between two Courts both of which have jurisdiction to try the offence should be decided on the ground of public convenience—44 Cal 59, F B (overruling 41 Cal 305) 5 L B R 17

Again the doubt must be as to the jurisdiction of the Court by which an offence is to be inquired into or tried and not as to whether a *particular Magistrate* is competent to commit the accused for trial—1887 P R 13, 3 All 251 Where no doubt exists as to the jurisdiction of the Court, the section does not apply—1887 P R 24

Subsection (2) —

Power of High Court to transfer case from Court outside jurisdiction —Where the nominee of a policy holder, resident within the district of Chittagong brought a charge of cheating in the Chittagong Magistrate's Court against the Insurance Company having its head office at Gujranwalla and a branch office at Chittagong and the Insurance Company brought a charge of cheating against the nominee in the Gujranwalla Magistrate's Court, both charges relating to the payment of the amount secured on the policy, it was held that the Calcutta High Court could properly make an order under sec 185 to the effect that the offence should be inquired into and tried at Chittagong, and transfer the case from the Court at Gujranwalla to that of Chittagong—17 C W N 761 In another Calcutta case also it was held that this section was comprehensive enough to be applicable to cases instituted in Courts beyond the local limits of the Appellate Criminal Jurisdiction of the High Court where the offender actually was—44 Cal 595 *Contra*—The Madras High Court however held to the contrary that the High Court had no power to direct the transfer of a case pending before a Magistrate not subject to its jurisdiction—40 Mad 835

trate for an offence committed in a Native State, and the Political Agent's certificate (required by sec 188) was obtained it was unnecessary to send the accused to the District Magistrate under this section and the First-Class Magistrate was competent to hold the preliminary inquiry himself—
Ratanlal 97

188 When a Native Indian subject of Her Majesty commits an offence at any place within or beyond the limits of British India, or

Liability of British subjects for offences committed out of British India

when any British subject commits an offence in the territories of any Native Prince or Chief in India, or

when a servant of the Queen (whether a British subject or not) commits an offence in the territories of any Native Prince or Chief in India

he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found

Provided that *notwithstanding anything in any of the preceding sections of this chapter* no charge as to any such offence shall be inquired into in British India unless the Political Agent, if there is one, for the territory in which the offence is alleged to have been committed, certifies that in his opinion, the charge ought to be inquired into in British India, and where there is no Political Agent, the sanction of the Local Government shall be required

Political Agents to certify fitness of inquiry into charge

Provided, also that any proceedings taken against any person under this section which would be a bar to subsequent proceedings against such person for the same offence if such offence had been committed in British India shall be a bar to further proceedings against him under the Foreign Jurisdiction and Extradition Act, 1879 in respect of the same offence in any territory beyond the limits of British India

Change —The italicised words in the proviso have been added by sec 44 of the Criminal Procedure Code Amendment Act, 1923

This section controls the preceding sections —Sections 177—184 are controlled by the provisions of sec 188, so that if the offences specified in those sections (177—184) happen to be committed outside British India, those sections would cease to apply, and the special provision of Sec 188 would come in. Thus, to give concrete illustrations, where the offence of criminal breach of trust was committed in a Native State, and part of the property was retained by the accused, within British India, then according to Sec 181, independently of Sec 188, such offence could have been tried by a British Court. But as Secs 177—184 are controlled by Sec. 188, the latter section would apply, and the certificate of the Political Agent would be absolutely necessary—5 S L R 266. So also, where a person was kidnapped in a Native State and conveyed to British territory, Sec 181 would be applied subject to Sec 188, and a certificate of the Political Agent would be a preliminary requisite of the trial of the offence by a British Court—7 S L R 17.

But in a Madras case, where the complainant in a place in British India entrusted certain jewels to the accused, a Native Indian subject of His Majesty, for sale on commission and the latter pledged the jewels in a Native State and converted it to his use, it was held that the loss of the jewels, which was the consequence, occurred to the complainant in British India, and this was sufficient under sec 179 to give jurisdiction to the British Indian Court to try the offence, that secs 179—184 should not be read subject to sec 188, and that no certificate of the Political Agent was necessary—38 Mad 779. This view of the law is totally untenable and the words 'notwithstanding anything Chapter' have now been added in the proviso to make it clear that sec 188 controls the preceding sections of this chapter. The Select Committee observe — "Certain decisions of the Madras High Court seem to make it doubtful whether section 188 is subject to the provisions of sections 179 184, and we think it is desirable to clear this up. We are not satisfied that this was the intention of section 188, and in our opinion it is safer, when a man is tried in British India in respect of an offence committed in a Native State, to require the Political Agent's certificate in every case. The amendment which we propose will make this clear. *Report of the Select Committee of 1916*

Illegal arrest —See notes under sec 177. A trial under this section will not be vitiated by reason of the fact that the accused has been brought into British India from a foreign territory under an illegal arrest —35 Bom 225

"Native Indian subject" —This expression means only a Native subject *de jure*, and not *de facto*, a person who owns some land in British

territory and occasionally resides in British India does not thereby become a British Indian subject, amenable to the jurisdiction of a British Indian Court for an offence committed by him in a foreign territory—1885 P R 1, 1883 P R 22

Foreigners —This section does not apply to an offence committed by a foreigner outside British territory, though he may subsequently be found in British India—10 Bom 186 British Indian Courts have no jurisdiction to try a foreigner for offences committed and completed outside the British territory—1894 P. R 7 No foreign subject can be tried in British India for an offence outside British India—28 All 372, 2 Bom L R 337, 1888 P R 22 Therefore where the subject of a Native State committed theft in that State, and was subsequently found in British India in possession of the stolen property, the British Indian Court had no jurisdiction to try him for the offence of theft (but had jurisdiction to try him for retaining stolen property, sec 411 I P C)—28 All 372 10 Bom 186 See notes under sec 180

"May be found" —The word 'found' must be taken to mean not where a person is discovered, but where he is actually present, whether he comes of his own accord or is brought under arrest—6 Bom 627

Scope of proviso —This proviso is of universal application and is not restricted to Native States only If the offence is committed in a Native State, the certificate of the Political Agent is necessary, if the Native State has no Political Agent, the sanction of the Local Government is required And if the offence is committed in a place other than a Native State *eg* Spun the sanction of the Local Government is likewise necessary—6 S L R 260

The words "or where there is no political Agent, the sanction of the Local Government shall be required" have been added in the Code of 1898 Under the previous Codes, when the offence was committed in a territory in which there was no Political Agent no certificate (or sanction) was necessary, as for instance in Coa 1, Bom 447 or Siam, Katanul 773, or Cyprus, 2 All 218

Offences on High seas —Section 188 does not apply to offences committed on the High seas The proviso to this section refers to offences committed in a 'territory' and not to offences committed on the High Seas Therefore an offence committed by a Native Indian subject on the sea at a distance of five or six miles from the coast can be tried by a Magistrate of British India without the certificate of the Local Government—41 Bom 667, 5 L B R 221 The power to try offences committed on the High seas is conferred on Indian Courts by Stat. 23 and 24

Vic , C 88 (within three miles from the Coast of British India) and Stat 30 and 31 Vic , C 124 section 11 (beyond the three miles limit) See 8 B H C R 63, 14 Bom 227

Certificate of a Political Agent —The certificate of the Political Agent is the preliminary requisite for the institution of criminal proceedings in a Court of British India for an offence committed outside British India. Want of certificate will invalidate all subsequent proceedings —24 All 256, 19 All 109, 41 All 452, 4 A W. N 85, 24 Bom 287; 8 Bom L R 513, 13 Mad 423, 5 Mad 23, 2 Weir 148. The want of certificate is not a mere irregularity which can be cured by section 532 —13 Mad 423. Even where the Magistrate was himself the Political Agent, the defect could not be cured by subsequent production of the certificate signed by him—13 Mad 423, 5 Mad 23, 19 All 109

An agreement between a Native State and the authorities of a British Indian district, conceding to the British Indian Courts the right to try subjects arrested in British India cannot take the place of the certificate or sanction required by this section—42 All 89

Where a commitment was made without the certificate, the fact that the certificate existed at the date of the commitment, (i.e. it had been signed by the Political Agent before the date of commitment, but had not come into the hands of the Magistrate till after commitment) will not cure the defect—24 All 256. In Punjab, however it has been held that the want of a certificate is not a fatal defect but a mere irregularity cured by section 537, if no objection is taken at the trial, and no prejudice to the accused has been caused in his defence—1888 P R 35, 1889 P R 30, 1902 P R 4. Where however the defect was observed and objected to by the Sessions Judge, he could quash the commitment—1889 P R 11

The proviso lays down that 'no charge shall be inquired into in British India unless the Political Agent' etc and therefore there is no thing illegal in obtaining the certificate after the complaint has been filed and the inquiry has begun or been completed as far as the framing of the charge—12 Bom L R 667. So also where the certificate was received after the examination of some prosecution witnesses but before the commitment of the case to the Sessions it was held that the commitment was good, and the irregularity, if any, was cured by sec. 537—8 Bom L R 507

Magistrate not confined to the charge in the certificate —The Magistrate is not restricted to the charge mentioned in the certificate. The certificate granted by the Political Agent in respect of an offence will

A Magistrate duly empowered under this section to take cognisance of an offence cannot refuse to take cognisance on the ground that the gravity of the offence requires severer punishment than he can inflict—*Ratanlal* 375

Offence —A Magistrate authorised under this section to take cognization of an offence upon complaint, can take cognizance of an offence under sec 20 of the Cattle Trespass Act, even in the absence of a special authorisation in that behalf, because the definition of the word 'offence' in section 4 clause (o) includes any act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act—44 Bom 42

"Taking cognizance"—The expression "to take cognisance" has not been defined in the Code, and it is difficult to ascertain at what precise stage of the case cognizance is said to be taken. When a Magistrate in charge on receipt of a police report makes over the case to another Magistrate for inquiry and the latter after taking evidence summons the accused, it is the latter Magistrate and not the former who is said to have taken cognizance of the offence—17 C W N 795

Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence—37 Cal 412. When a Magistrate takes cognizance of an offence upon complaint, the cognizance is not complete until he has examined the complainant on oath—t P L T 346

Where an officer who is also a Magistrate holds a departmental enquiry and charges are made before him, he cannot be said to have taken cognizance—19 Bom 51

In cases where sanction or certificate is necessary (*e g* cases under secs 132, 188, 197) the Magistrate is not competent to take cognizance upon a mere complaint unaccompanied by the requisite sanction or certificate—27 Cal 820

Magistrate cannot proceed without taking cognizance —On a complaint of a cognisable offence, the police sent up for trial only some of the persons against whom a complaint was made. After their conviction by a Deputy Magistrate, the Deputy Commissioner while inspecting the Police outpost, made a note that the remaining accused should be sent up. The remaining accused were thereupon sent up to the Deputy Magistrate. It was held that nothing was made over to the Deputy Magistrate at first except the case of some of the accused who were tried and convicted, and that the proceedings taken against the remaining accused without any one formally taking

cognizance of the case, were irregularly instituted and should be set aside—3 C. L. J 87.

Clause (a)—Cognizance upon complaint —For 'complaint' see Sec 4 (b) and notes thereunder

Complaint of facts which constitute offence —Where a complaint presented to the Magistrate contains the offences with which the accused is charged, the fact that it was defective in not stating *all the facts* necessary to constitute the offence charged is immaterial—1891 P. R. 8

Who can make a complaint —A complaint of an offence may be made by any person acquainted with the facts of the case, it need not necessarily be by the aggrieved party except in those cases (secs 198, 199) where it is so restricted by the Code—18 All 465, 13 Bom 600, 41 Cal 1013, 14 Cr L J 409 (Oudh)

The fact that the complainant is a servant of the Magistrate does not deprive the Magistrate of his jurisdiction, though in such a case it would be expedient to refer the complainant to another Magistrate—9 Bom 172 See notes under secs 526 and 556

Magistrate bound to take cognizance upon complaint —It cannot be held that the words 'may take cognizance of an offence' mean that a Magistrate is not bound to take cognizance of an offence on receiving a complaint of facts constituting an offence—4 O C 127 The use of the term "may offence" does not make it optional with a Magistrate to hear a complaint but refers to the action of the Magistrate in taking cognizance of the offence in either of the specified courses in which the facts constituting the offence may be brought to his notice He is bound to examine the complainant and can then either issue summons to the accused, or order an inquiry under sec 202 or dismiss the complaint under Sec 203—13 Cal 334 He is bound when the circumstances giving him jurisdiction exist, to receive the complaint and deal with it according to law—12 Bom 161

Instances where Magistrate acts under Cl (a) and not Cl (c) —Where a complaint is made before a Magistrate he takes cognizance of the case under clause (a) and not clause (c) even though he may record on the complaint that he acts under clause (c)—4 L. B. R. 300

Where a complainant charged certain persons with committing a certain offence, and the examination of the complainant revealed an offence different from that mentioned in the complaint the Magistrate was competent to take cognizance of the latter offence, and in taking cognizance thereof he acted under clause (a) and not under clause (c)—26 Cal 786

Similarly, where the complainant charged several persons with having committed an offence, but the Magistrate after examination of the complainant found out that other persons, not mentioned in the complaint were concerned in the offence, he was competent to take cognisance in respect of the latter persons also, and in so doing he acted under clause (a) and not clause (c) so that sec 191 was not applicable to the case—76 Cal 786, 1904 P R 32, U B R (1897—1901) 156, 14 Bom L R 141, 41 Cal 1013, 4 C W N. 367

Clause (b)—Police Report —The 'police report' mentioned in this section is not limited to a report mentioned in Chap XIV of the Code. Where on information received by post, a Magistrate sent the case to the police for enquiry and report and on the report thus received took cognisance of the case, it was held that it must be presumed that the action taken by him was based on police report—11 A L J 331

A police report in a non cognisable case falls within this clause, and there is no authority in the Code for examining a police officer submitting a police report under this section, as if he were a complainant—1914 U B R 19, 1 P L T 446 See notes above under heading "Change"

A report submitted by a Police officer under sec 24 of the Police Act falls under this clause—1 P L T 446

A Police *challan* is a police report of facts constituting an offence under clause (b) and a Magistrate can take cognisance upon it—1901 P R 8, 1900 P R 22 But a mere suggestion by the police officer is not a police report, and where a Magistrate issued summons to the accused on a suggestion of a police officer that the accused injured the crops of the people of the village it was held that the Magistrate acted illegally, as none of the conditions required by this section had been fulfilled—1894 P R 24

So also a Magistrate can not take cognisance of an offence on the mere information of a police officer who has no knowledge of the facts and whom it is impracticable to examine—1 L B R 18

Magistrate not bound to take cognisance upon police report —A Magistrate is entitled to refuse to initiate proceedings on the report of the Police, in the absence of a complaint—1 A L J 609 He has a discretion either to take cognisance of the offence or to proceed under sec 203 or to take no further steps—2 Weir 119

Defective police report —A prosecution is not legally instituted under section 190 (b) when the police report does not fulfil all the requirements of sec 173 (c) & when it does not set forth the nature of the information and the first information report under sec 154 is equally defective in this respect—37 Cal 49 In 16 C W N 1049 it has been remarked that if the

police report be defective it is open to the Magistrate to treat it as a complaint and in that case it will be necessary for him to call upon the Police officer to appear and substantiate that complaint upon oath

Instances where Magistrate acts under Clause (b) and not under Clause (c) —Where L. was charged by the police before the Magistrate, and the Magistrate after examining the investigating officer found that another person S should be joined as accused person, and issued process against him, it was held that the Magistrate took cognizance of S's offence under clause (b) and not under clause (c) and was not bound to act under sec. 191—9 N. L. R. 65 Similarly, where the Magistrate issued warrants against persons not named in the complaint or in the first information, but named in a report subsequently made by the police after investigation, it was held that the Magistrate took cognizance of the case under clause (b) and not under clause (c) of this section—8 C W N 864. Where a Magistrate while acquitting a certain person sent up by the Police, stated that another person had in his opinion committed the offence, and that the Police should take action against that person, and that person was accordingly sent up and convicted, it was held that the Magistrate acted under clause (b) and not clause (c) and sec 191 was not applicable—4 L. B. R. 137. Where an accused person charged by the Police was convicted and the case came up in appeal before a Subdivisional Magistrate, the latter was empowered to try the offender himself if the offence was one within his ordinary jurisdiction, and in so doing the Subdivisional Magistrate took cognizance of the case not under clause (c) but under clause (b), as he had before him the police charge sheets stating all the facts—30 Mad 228 Where after the close of a trial the Magistrate ordered the police to send up a charge sheet in respect of a witness for the prosecution, which the Police did, and then the Magistrate tried the accused and convicted him, held that the Magistrate took cognizance of the case under clause (b) and not under clause (c), and section 191 did not therefore apply to the case—23 Bom L R 842

Clause (e) —This clause applies only to cases where the private individual who is injured or aggrieved or some one on his part does not come forward to make a formal complaint. It is a provision of law for enabling a public official to take care that justice may be vindicated notwithstanding that the persons individually aggrieved are unwilling or are unable to prosecute—13 W. R. 27

A Magistrate cannot take cognizance of an offence under this clause without complying with the provisions of law laid down in section 191 *infra*—1 P. L. T. 446.

Information —The expression "information received from any person other than a Police officer" means only such information as does not constitute a complaint or Police report—4 L B R. 300

The information need not contain all the allegations necessary to be proved to establish the offence, it is sufficient if enough is alleged to justify the Magistrate in dealing judicially with the matter. What allegations or how much of the information should be recorded by the Magistrate in such a case it is difficult to lay down in general terms, but when it is found that the recorded information is sufficient to justify the Magistrate in considering that a *prima facie* case has been made out, the High Court will not interfere with the Magistrate's action in taking cognisance under this clause—35 Cal 1076

Where the Deputy Commissioner, as Collector and as such representing the Court of Wards, received information of an offence, he as Magistrate was not competent to act on the information, and to issue warrants, as by such action he was practically making himself a Judge in his own case—10 C W N 775, 37 Cal 221. But this view does not seem to be correct for sec 191 provides a sufficient safeguard and gives the accused a right to have the case transferred to another Magistrate. On this principle the Madras High Court has held that there can be no objection to a Magistrate taking cognisance of an offence upon information received by him in another capacity *e.g.* as President of the District Board—43 Mad 709

The following are held to be information within the meaning of this section —An anonymous communication—3 C W N 63, communication through post—2 Weir 149, 19 A W N 201, information received from another Magistrate—1914 P W R 10, 3 C W N cclxii

Information must be recorded —A Magistrate taking cognisance upon information under this clause should at least record the information on which he acted, though he may not be obliged to disclose the sources of information—10 C W N 775, 35 Cal 10/6

Information received from witness —A Magistrate taking cognisance of an offence against a person on evidence given on behalf of another accused person, proceeds under clause (c) of this section—3 C W N cclxxix. So also, a Magistrate who takes cognisance of an offence against a witness in a case pending before him upon the facts disclosed by the evidence of another witness, does so under clause (c) of the present section and not under section 351—1 C W N 105. *Contra*—N L R 113 where under such circumstances section 351 was held to be applicable. See also 45 L R 258. If however the Magistrate has already taken cognisance upon a complaint of an offence against some

person, and after examination of some witnesses, the offences of other persons are revealed, the Magistrate proceeding against the latter does so under clause (a), (since there is a *complaint*)—41 Cal. 1013.

Knowledge —Knowledge means actual personal knowledge of the Magistrate or knowledge based upon evidence legally before him—1 L. B. R. 18. A gratuitous suspicion or belief founded on private information contained in an anonymous petition is not knowledge—13 W. R. 1. Where a Magistrate issued an order under sec. 144 to stop work in a quarry, and took action for the disobedience of that order, and convicted the accused, it was held that the Magistrate took cognisance of the offence on his own knowledge of facts under this clause—1905 1 L. R. 84. So also, where the accused in disobedience of an order given by a Cantonment Magistrate tied his buffaloes in a certain place and the Magistrate finding the place filthy in consequence sent for the accused and fined him, it was held that the Magistrate took cognisance from his own knowledge under this clause and was debarred from trying the case by virtue of sec. 191—1905 1 P. R. 8.

Suspicion —Where a Magistrate has a mere suspicion that an offence has been committed he should not, as a matter of sound judicial discretion, take cognisance of it until some person aggrieved has complained (clause a) or until he has before him a police report (clause b) on the subject based on investigation directed to the offence—14 Cal. 707.

Miscellaneous —

Fresh complaint after discharge —A Magistrate has jurisdiction to entertain a second complaint on the same facts after an order of discharge was passed by another Magistrate before whom the former complaint was made—2 P. L. J. 34. The discharge of a person accused of an offence is no bar to his being apprehended and brought before a Magistrate for commitment or trial—3 W. R. 61, 14 W. R. 62. *Contra*—2 Bom. 534.

Limitation —The general law of limitation is chiefly intended for civil matters and does not apply to the taking cognisance of offences—20 Bom. 543.

Complaint in respect of one offence—Cognisance in respect of another —See 26 Cal. 786 cited above under cl. (a).

Complaint against some persons cognisance against others —Where a complaint is made against some persons and the Magistrate takes cognisance of the offence, it is the duty of the Magistrate to deal with the evidence brought before him, and to see that justice is done in-

regard to any other person who might be proved by the evidence to be concerned in the offence—4 C W N. xlv When once a Magistrate has taken cognizance of an offence, he is competent to take proceedings against all who from evidence appear to be offenders. His power is not limited only with regard to the persons mentioned in the complaint or Police report—4 C W N 560, 21 C W N 950, 1 Bur L J 183 See also U B R (1897—1901) 56; 26 Cal 786; 1904 P R 32, 14 Bom L R. 141; 41 Cal 1013; 4 C. W. N 367 cited under clause (a), and 9 N. L R. 65; 8 C. W. N 864, cited under clause (b)

191. When a Magistrate takes cognizance of an offence under sub section (1), clause (c), of the preceding section, the accused shall, before any evidence is taken, be informed that he is entitled to have the case tried by another Court, and if the accused, or any of the accused if there be more than one, objects to being tried by such Magistrate, the case shall, instead of being tried by such Magistrate, be committed to the Court of Session or transferred to another Magistrate.

Transfer or commitment on application of accused.

Principle —The principle of this section is that no man ought to be a Judge in his own case If a Magistrate proceeds against a person upon his own personal information, he is interested in the prosecution, and thereby he would practically make himself a Judge in his own case, and his pre-conceived opinion of the guilt of the accused is likely to prejudice the accused in his trial.

Besides the above, the section has another object in view, viz, "to clear away everything which might engender suspicion and distrust (in the mind of the accused) of the tribunal and so to promote the feeling of confidence in the administration of Justice which is so essential to social order and security. The law in laying down the strict rule has regard not so much to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant parties"—*per* Miller and Lush JJ in *Serjeant v. Dale*, 2 Q B. D 558, quoted in 19 Mad 263

A Magistrate cannot take cognizance of an offence under clause (c) of section 190, without complying with the provisions of this section—1 P. L. T. 446. Where on a report being made by a Cantonment official in respect of an offence under sec 92 of the Cantonment Code, the Cantonment Magistrate took cognizance of the case and convicted the accused held that the Magistrate should have informed the accused

under this section that he was entitled to have the case transferred to another Magistrate—21 Cr. L. J. 394(Lah)

Right of accused to have case transferred—The words “shall be informed that he is entitled” are mandatory, and a Magistrate cannot refuse to comply with them—13 All. 345. He is bound to inform the accused of his right to have the case transferred. If he omits to inform the accused of his right, or if in spite of objections taken by accused, the Magistrate proceeds with the case, the proceedings will be wholly void. It is not a mere irregularity curable by section 537—13 All. 345; 28 All. 212; 3 A. L. J. 694; 19 A. L. J. 138, 21 A. L. J. 89; 1905 P. R. 8; 5 N. L. R. 113; 1898 P. R. 13; 22 Cr. L. J. 96 (Lah).

The accused can waive his right under this section—1 S. L. R. 98. But if a Magistrate omits to inform the accused of his right, the mere silence on the part of the accused is not to be taken as a waiver of his right—3 C. W. N. cclxxix 21 A. L. J. 89

Although this section enables the accused to apply for a transfer of the case, still, unless the accused exercises that right, the jurisdiction of the Magistrate to try the case is unquestionable. The mere fact that the Magistrate has taken cognisance under section 190, clause (c), does not oust the jurisdiction of the Magistrate to hear and determine the case—13 A. W. N. 79

Omission to inform accused, not a ground of transfer—The omission by the Magistrate to inform the accused that he is entitled to have his case tried by another Court may be a ground for having the proceedings set aside, but it is no ground for making an order for transfer—2 Weir 151.

Nature of the accused's right—All that the accused is entitled to under this section is to have the case tried by *another* Court, but he cannot choose or determine for himself by what *other particular* Court the case is to be tried—7 B. L. R. 637. And the Magistrate has a discretion, on objection being taken, either to transfer the case to another Magistrate or to commit it to the Sessions. He is not bound to transfer the case to another Magistrate. He may elect to commit the case to the Court of Session—22 Mad. 148

Again, the accused can object only to the *trial* of the case by that Magistrate, he cannot object to a *preliminary inquiry*. This section directs the Magistrate either to transfer the case to another Magistrate or to commit the case to the Sessions. And the commitment involves the holding of a preliminary inquiry. This section empowers the Magistrate to hold a preliminary inquiry even in a case triable by himself, if the

case is one triable exclusively by the Sessions Court, the Magistrate is *a fortiori* entitled to hold an inquiry preliminary to commitment—21 All 109, 20 Cr L J 47 (Cal)

When objection to be taken —If the accused wants to be tried by another Court, he must express his objection before any evidence is taken—1894 P R 29

Application of this Section to Chapter VIII —The provisions of secs 190 and 191 do not apply to proceedings under sec 110 and a Magistrate who has instituted proceedings need not inform the person proceeded against that he is entitled to have his case transferred to another Magistrate—27 All 172 But in 29 Cal 392 and 4 P L J 7, however, it has been held that the principle of this section, viz that no man ought to be a judge in his case, applies to proceedings under Sec 110 though they do not relate to *offences*. Therefore, where a Magistrate has initiated proceedings against a person under sec 110 mainly if not wholly upon his own knowledge of the character of that person, he is incompetent to proceed with the trial under Sec 117

Magistrate's power to hear appeal —A Magistrate who takes cognizance of a case, under sec 190 (c) cannot after becoming a District Magistrate, hear an appeal from a conviction in the case (which was tried by an another subordinate Magistrate) without following the procedure laid down in Sec 191, as an appeal is a part of the trial of the offence—12 C W N 438

192 (1) Any Chief Presidency Magistrate, District Magistrate or Sub divisional Magistrate
Transfer of cases by Magistrate may transfer any case, of which he has taken cognizance, for inquiry or trial, to any Magistrate subordinate to him

(2) Any District Magistrate may empower any Magistrate of the first class who has taken cognizance of any case to transfer it for inquiry or trial to any other specified Magistrate in his district who is competent under this Code to try the accused or commit him for trial, and such Magistrate may dispose of the case accordingly

May transfer —The power under this section is optional and not obligatory. As to cases which a Magistrate is disqualified from trying and is bound to transfer, see Secs 487 and 556

'Any case' —This section deals with the power of the Magistrate to transfer *any* case the words 'any case' are not restricted to criminal

cases only, but are wide enough to include any case triable by any criminal Court, *e.g.* cases under Chapter VIII—35 Cal. 243 ; 24 All. 151 ; 1 Pat. 621 ; or cases under Chapter XII—22 Cal. 898 ; 10 C. W. N. 1095 ; 20 A. L. J. 215 Even if the transfer be not strictly legal, the irregularity would be cured by Sec. 529 (f)—2 C. L. J. 614 ; 4 C. W. N. 821.

*Power to transfer cases which the subordinate Magistrate is incompetent to try :—*Under subsection (1), the Magistrate has power to transfer a case to a subordinate Magistrate, even though the latter be incompetent to try the case on his own initiative, *e.g.* a complaint under Sec. 20 of the Cattle Trespass Act can be entertained only by the District Magistrate or a Magistrate specially authorised ; but this section will empower a Subordinate Magistrate to try the case, if it is transferred to him by the District Magistrate—34 Cal. 926

But if a first class Magistrate transfers a case under subsection (2), he can transfer only those cases to a Subordinate Magistrate which the latter is competent to try.

*'Of which he has taken cognisance' :—*This section enables a District Magistrate to transfer only those cases of which he has taken cognisance under Sec. 190 It has no reference to cases which has been transferred to that Court—12 A. L. J. 277. In other words, a case which has once been transferred cannot be transferred again under Sec. 192—1 L. B. R. 86 , 7 M. H. C. R. App 33. In 21 Cr. L. J. 96 (Pat) however it has been held that the second transfer is a mere irregularity covered by Sec. 529 of the Code. But where a case had been transferred by the Chief Court under sec. 526 from the Dt. Magistrate of Rohtak to the Dt. Magistrate of Hissar with a direction that he should either dispose of the case himself or transfer it to some other competent Magistrate in the District and the District Magistrate of Hissar transferred the case under sec. 129 to an Honorary Magistrate, *held* that the District Magistrate of Hissar was competent under this section to make the transfer—1917 P. R. 30 , 19 All 249

*When case can be transferred :—*The Magistrate can transfer the case, on taking cognisance of it A District Magistrate is competent, under sec. 190 to take cognisance without complaint, and to transfer the case to a subordinate Magistrate without such complaint—1 S. L. R. 119 He can transfer the case before any process has been issued to the accused—7 N. L. R. 67. He can transfer a case after summons has been issued against the accused—7 C. L. J 249. But a case cannot be transferred under this section after it has been partly tried—2 Weir 152, *e.g.* after

all the evidence for the prosecution and the defence has been taken—
12 All 66

By whom and to whom case can be transferred —A case can be transferred under this section by the Magistrate specified to the Court of a Magistrate *subordinate* to him and not to a *superior* Magistrate. A transfer of a case by a Subordinate Magistrate to a District Magistrate is not contemplated by this section—10 A W N 7 A third class Magistrate cannot transfer a case to a District Magistrate—12 All 66

How much of the case need be transferred —Where a complaint or a police report deals with several persons, it is not necessary that the entire case, e g , the case regarding the offences committed according to the complaint or Police report should be transferred. Whether the entire case has been transferred or not is a question of fact, depending on the intention of the transferring Magistrate and this intention must be gathered from the order itself. Where no reservation is made, it may be concluded that the whole case has been transferred—32 Cal. 783. Thus, where a complaint was lodged against several persons, and the Magistrate after examining the complainant, issued summons against one of the accused only and transferred the case to a Subordinate Magistrate, it was held that the whole case of the complainant was transferred, and the Subordinate Magistrate could take proceedings against the other accused persons also—7 C L J 249.

'Subordinate to him' —The transferring Magistrate can transfer the case to a *subordinate* Magistrate, and not to a superior Magistrate. See 10 A W N 7 and 12 All 66 cited above

The subordination of the Presidency Magistrates to the Chief Presidency Magistrate shall be deemed to be of the same kind and extent as the subordination of Magistrates and Benches to the District Magistrate under Sec 17 (1). The Chief Presidency Magistrate can under Sec 528 withdraw any case from any Presidency Magistrate and refer it for inquiry or trial to any other such Magistrate—1 Bom L R 347

For the purpose of this section, an Additional District Magistrate in subordinate to the District Magistrate, see Sec 10(3)

Effect of transfer —When a District Magistrate has transferred a case for trial to a Deputy Magistrate, the former has no jurisdiction in the case so long as the transfer is in existence, and cannot take any further steps in the matter or decide the case himself, unless the case is withdrawn to his own file under section 528—12 W R 53, 27 Cal 979, 46 Cal 854. Until the transferring Magistrate had withdrawn the case from the file of the subordinate Magistrate (to whom the case was trans

ferred) to that of his own Court he had no power to make any order save an order for further inquiry under Sec. 436—32 Cal. 783 ; 30 Cal. 449. In this respect this section differs from Sec. 202. Under that section the Magistrate receiving a complaint refers it to a subordinate Magistrate only for enquiry and report, and does not cease to have control over the case. The provisions of secs 192 and 202 are separate and distinct and the powers conferred by one section do not curtail those conferred by the other—46 Cal. 854.

Procedure before transfer —Notice to parties —Before a case is transferred under this section from one subordinate Court to another, the District Magistrate should give notice to the parties of such transfer—S Cal 393 , 3 All. 749 , 2 Bom L. R. 342 , Ratanlal 460 , 22 Bom. 549.

Examination of complainant —Under Sec 200, proviso (a), when a complaint is made in writing, the Magistrate is not bound to examine the complainant before transferring the case under this section. See also 18 W. R. 18. The decision in 4 N W P H. C R 88 is not good law.

Procedure after transfer —Examination of complainant —If the transferring Magistrate has already examined the complainant, the Magistrate to whom the case is transferred is not bound to examine the complainant again—Sec. 200 (c)

Examination of prosecution witness —Even where the transferring Magistrate has examined all the prosecution witnesses, still the Magistrate to whom the case is transferred is bound to examine the witnesses again. He cannot act upon the deposition of witnesses recorded by the transferring Magistrate—14 All. 346 , 2 Weir 152 ; see also 12 C. W N 140.

Transfer by High Court .—In the case of a transfer of a criminal case by the High Court from a Court subordinate to the District Magistrate to the District Magistrate's Court, it will be understood that the District Magistrate should try the case himself, unless the High Court has expressed that the District Magistrate shall have the power to transfer the case to a subordinate Court. But when the transfer is from the Court of one District Magistrate to the Court of another District Magistrate, it will be understood, unless the contrary is directly expressed, that the Magistrate of the Court to which the transfer is made has power and jurisdiction to apply section 192, and to transfer the case to the Court of any Magistrate subordinate to him, who may be competent to try it—19 All 249 , 1917 P R 30

193. (1) Except as otherwise expressly provided by this

Cognizance of offences
by Court of Session.

Code or by any other law for the time
being in force, no Court of Session shall

take cognizance of any offence as a Court of original juris-

diction unless the accused has been committed to it by a Magistrate duly empowered in that behalf

<p>(2) Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the Local Government by general or special order may direct them to try, or, in the case of Assistant Sessions Judges, as the Sessions Judge of the division, by the general or special order, may make over to them for trial</p>	<p>(2) Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the Local Government by general or special order may direct them to try, or, [* * * *] as the Sessions Judge of the division, by the general or special order, may make over to them for trial</p>
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Change —The words “ in the case of Assistant Sessions Judges ” which occurred in subsection (2) after the words “ may direct them to try ” have been omitted by sec 46 of the Criminal Procedure Code Amendment Act ‘ We propose to omit from section 193 (2) the words “ in the case of Assistant Sessions Judges ” The section, as it stands at present, makes a distinction between Additional Sessions Judges and Assistant Sessions Judges, only allowing transfers by the Sessions Judge in the case of the latter Considerable inconvenience has been felt owing to this limitation, which we propose to remedy by the omission of the words referred to above ’ —*Report of the Select Committee of 1916*

Object of this section —The object of this restriction is to secure, in the case of a person charged with a grave offence, a preliminary inquiry which would afford him the opportunity of becoming acquainted with the circumstances of the offence imputed to him and enable him to make his defence—3 Mad 351 The law contemplates that in the serious cases of which a Court of Session may take cognisance, the accused should have some information of the case he has to answer—4 Mad 227

Trial without commitment —The trial in the Court of Session without a commitment is *ultra vires*—15 Mad 352, 1884 P R 42, 22 Cal 50 The absence of commitment is a defect of substance and not merely of form and is not cured by section 537—1884 P R 42 Even where a Sessions Judge holds that the approver who is giving evidence before him as a witness is not complying with the conditions of pardon he cannot try him at once, but can do so only after a proper commitment by a competent Court—15 Mad 352, 22 Cal 50, 1 B R (1893—1900) 536

Irregular commitment —If the commitment is made by a Magistrate duly empowered, the fact that the Magistrate investigated the case without a formal complaint is not a ground of treating the commitment as a nullity, the Sessions Court should proceed with the trial in the usual course—4 B. H. C. R. 35

Onus of proof —Where the commitment was made by a person exercising the powers of a Magistrate, that fact is sufficient to entitle a Sessions Court to proceed with the trial, and it would be on the party impugning the correctness of the proceedings to show that there was no jurisdiction—13 W. R. 17

Reference under sec 123 —Power of Additional Sessions Judge—A reference to a Court of Session by a Magistrate of a case under section 123 is not a case 'committed for trial, and the Court of Session disposing of it does not 'try a case' within the meaning of this section. An Additional Sessions Judge empowered to try all cases which may be committed for trial by the Magistrate of the District has no jurisdiction to pass an order on such reference—Ratanlal §30

Assistant Sessions Judge appointed temporarily —An Assistant Sessions Judge who has been directed by the Government to take over charge of the duties of Sessions Judge during a temporary vacancy of the office, is not an officer appointed to act as a Sessions Judge, and has no jurisdiction to try any case even as Assistant Sessions Judge, unless it was made over to him under a general or special order under the last part of this section—Ratanlal §50

194 (1) The High Court may take cognizance of any offence upon a commitment made to it in manner hereinafter provided

Cognizance of offences
by High Court

Nothing herein contained shall be deemed to affect the provisions of any Letters Patent granted under the Indian High Courts Act, 1861, or the Government of India Act, 1915, or any other provisions of this Code

(2) (a) Notwithstanding anything in this Code contained, the Advocate General may, with the previous sanction of the Governor-General in Council or the Local Government, exhibit to the High Court, against persons subject to the jurisdiction of the High Court, information for all purposes for which Her Majesty's Attorney-General may exhibit informations on behalf of the Crown in the High Court of Justice in England

Information by Advocate
General

(b) Such proceedings may be taken upon every such information as may lawfully be taken in the case of similar informations filed by Her Majesty's Attorney General so far as the circumstances of the case and the practice and procedure of the said High Court will admit

(c) All fines penalties forfeitures, debts and sums of money recovered or levied under or by virtue of any such information shall belong to the Government of India

(d) The Hight Court may make rules for carrying into effect the provisions of this section

195 (1) No Court shall take cognizance—

(a) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code, except with the previous sanction, or on the complaint, of the public servant concerned, or of some public servant to whom he is subordinate,

(b) of any offence punishable under sections 193 194, 195, 196 199, 200, 205, 206, 207, 208 209 210, 211 or 228 of the same Code, when such offence is committed in, or in relation to, any proceeding in any Court, except with the previous sanction, or on the

195 (1) No Court shall take cognizance—

(a) of any offence punishable under sections 172 to 188 of the Indian Penal Code except * * * on the complaint *in writing* of the public servant concerned or of some other public servant to whom he is subordinate

(b) of any offence punishable under any of the following sections of the same Code, namely, sections 193, 194 195, 196, 199, 200, 205, 206 207, 208, 209 210, 211, and 228, when such offence *is alleged to have been* committed in, or in relation to, any proceeding in any

complaint, of such Court, or of some other Court to which such Court is subordinate,

(c) of any offence described in section 463 or punishable under sections 471,

Prosecution for certain offences relating to documents given in evidence

475 or 476 of the same Code, when such offence has been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except with the previous sanction, or on the complaint, of such Court, or of some other Court to which such Court is subordinate

(2) In clauses (b) and (c) of sub section (1) the term "Court" means a Civil, Revenue or Criminal Court, but does not include a Registrar or Sub Registrar under the Indian Registration Act, 1877

(3) *See infra*

(4) The sanction referred to in this section may be expressed in general terms,

Nature of sanction necessary

Court, except * * * on the complaint *in writing* of such Court or of some other Court to which such Court is subordinate, or

(c) of any offence described in section 463 or punishable under section 471,

Prosecution for certain offences relating to documents given in evidence

section 475 or section 476 of the same Code, when such offence *is alleged to have been* committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding except * * * on the complaint *in writing* of such Court, or of some other Court to which such Court is subordinate

(2) In clauses (b) and (c) of sub section (1) the term Court *includes* a Civil, Revenue or Criminal Court, but does not include a Registrar or Sub Registrar under the Indian Registration Act, 1877

(omitted)

and need not name the accused persons, but it shall, so far as practicable, specify the Court or other place in which, and the occasion on which, the offence was committed

(5) When sanction is given in respect of any offence referred to in this section, the Court taking cognizance of the case may frame a charge of any other offence so referred to which is disclosed by the facts

(omitted)

(6) Any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate, and no sanction shall remain in force for more than six months from the date on which it was given provided that the High Court may, for good cause shown, extend the time

(omitted)

(7) For the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie, that is to say —

(3) For the purposes of this section, a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the *appealable decrees or sentences* of such former Court, or in the

(c) Where no appeal lies, such Court shall be deemed to be subordinate to the principal Court of original jurisdiction within the local limits of whose jurisdiction such first mentioned Court is situate

(a) where such appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate

(b) Where such appeals lie to a Civil and also to a Revenue Court such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case in connection with which the offence is alleged to have been committed

(3) The provisions of sub-Section (1), with reference to the offences named therein, apply also to criminal conspiracies to commit such offences and to the abetment of such offences and attempts to commit them

case of a *Civil Court* from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original *civil* jurisdiction within the local limits of whose jurisdiction such *Civil Court* is situate

Provided that—

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate, and

(b) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case *or proceeding* in connection with which the offence is alleged to have been committed

(4) The provisions of sub-Section (1) with reference to the offences named therein, apply also to criminal conspiracies to commit such offences and to the abetment of such offences, and attempts to commit them

(5) *Where a complaint has been made under sub-Section (1), clause (a), by a public servant, any authority to which such public servant is subordinate may order the withdrawal of the complaint and, if it does so, it shall forward a copy of such order to the Court and, upon receipt thereof by the Court, no further proceedings shall be taken on the complaint*

Change —This section has been substantially amended by sec. 47 of the Criminal Procedure Code Amendment Act (XVIII of 1923).

The changes introduced by the present Amendment are the following —

(1) The words "with the previous sanction" have been omitted from clauses (a) (b) and (c) of subsection (1). Under the old law, a private person could launch a prosecution for the offences referred to in this section, after obtaining the sanction of the Court. Under the present law, by abolishing sanction altogether, the right of private individuals to prosecute for the said offences has been taken away. Subsections (4) (5) and (6) which dealt with sanction have also been omitted.

(2) The words "in writing" have been added after the word "complaint" in clauses (a) (b) and (c), and the words "is alleged to have been committed" have been substituted for the words "have been committed" in clauses (b) and (c). See 5 P. L. J. 135.

(3) In subsection (2) the word 'includes' has been substituted for 'means'. This amendment is merely verbal.

(4) Subsection (3) has been re-numbered as subsection (4).

(5) Subsection (7) has been re-numbered as subsection (3), because that subsection should come in more properly after the definition of the word 'Court' in subsection (2). The old clause (c) of that subsection has now been incorporated into the body of subsection (3) with this restriction that it is now confined to civil Courts only.

(6) Subsection (5) is entirely new.

Reasons for the change —"The provisions of section 195 cause constant and great difficulty, and various amendments have been suggested which we have considered at length. We have no doubt that it will not be possible to remedy the evils which are connected with this section so long as private individuals are allowed to prosecute for offences connected with the administration of justice. In our opinion the only effective way of dealing with this section is to allow prosecutions to be launched only by the public servant or by the Court.

"We see no reason why the public servant or the Court should not file a complaint exactly in the same way as a private individual would do

in other cases and our proposals in this connection with this section and the enlargement of section 476 involve the adoption of this principle. In our view section 195 should bar the cognizance by any Court of offences of this nature except upon such complaint, while the procedure to be followed when the Court desires to prosecute should be prescribed by section 476.

"The adoption of this principle will at all events get rid of the objectionable practice of keeping a sanction which has been granted to a private individual, hanging over the head of the accused person for a period of six months, which is frequently utilised for the various purposes of blackmail. In the case of a complaint by a Court or the public servant we do not think that it will be necessary to prescribe any limit of time.

"It will also, in our opinion, be a distinct advantage to get rid altogether of the term "sanction" in connection with these prosecutions, a result which will be affected by the amendments we propose.

"We recognise that clause (a) of subsection (1) stands on a somewhat different footing from clauses (b) and (c), but we think there is no reason to retain even in it any reference to a sanction, as prosecutions under clause (a) can reasonably be launched in all cases on the direct complaint of a public servant'—*Report of the Select Committee of 1916*

. [It should be noted that all the cases cited below are cases relating to *sanctions*, but the principle of those cases applies also to complaints, for under the old law no distinction was made between sanction and complaint. The cases noted below are therefore cited with certain verbal alterations.]

Object of Section—The object of this section is—to protect persons from being needlessly harassed by rash, baseless or vexatious prosecutions at the instance of private individuals for the offences specified—39 Mad 677, 32 M L J 54, to protect persons from criminal prosecutions by persons actuated by personal malice or ill will or frivolity of disposition—18 All 203, 7 A W N 142, 1 C W N 400, to protect persons from criminal prosecutions upon insufficient grounds and to ensure prosecution only when the Court after due consideration is satisfied that there is a proper case to put a party on his trial—4 L B R 234, to insist on there being prosecutions only when public justice demands it and to prevent prosecution when public interest cannot be served—1 C W N 400, 2 Weir 178, Ratanlal 374, 3 C W N 3, 13 A W N 104, and to save the time of Criminal Courts from being wasted by endless prosecutions without convictions—39 Mad 677, 1 C W N 400.

Duty of Court —A complaint ought not to be made under this section when there is no probability of conviction. It is necessary for the Court before making a complaint, to consider the evidence and to decide as to whether there is a *prima facie* case and any reasonable chance of conviction being obtained—2 Weir 188, 26 Mad 116, 12 M. L. J. 408; 12 M. L. J. 392; 12 C W N 3, 4 P L J. 374, 7 Bom. L. R. 732, 32 M. L. J. 54, 13 A L J. 1111, 6 L W 241, 10 N L R 177

It would be an abuse of the powers vested in a Court of justice if complaints were made on the principle that though the conviction of the of the party complained against is a mere possibility, it is desirable that the matter should be thrashed out, so that it may be decided whether or not an offence has been committed—37 Cal 250

Subsection (1)—Complaint —If a Court adopts the procedure laid down in Sec 476, and after making the necessary inquiry under that section, sends the case to a first class Magistrate, such action amounts to making a complaint—10 Bom 102 In order to make a complaint under this section, the Judge or Munsiff will not have to appear before a Magistrate and make a complaint on oath like an ordinary complainant. If he adopts the procedure under sec 476, that would be sufficient. Section 476 was enacted with the object of avoiding the inconvenience which might be caused if a Munsiff or subordinate Judge or a Judge were obliged to appear before a Magistrate and make a complaint on oath in order to lay the foundation of a prosecution—7 All 871.

But it should be noted that Sec 476 refers only to offences 'when committed before the Court' and the ruling in 7 All, 871 must be applied to those cases only But if the offence is committed before a public servant other than a Court, his proper course is to prepare an ordinary complaint. See U B. R (1908) Cr P C 13

Instances of complaints —Where a Munsiff who heard a suit was of opinion that certain persons should be prosecuted for offences under Secs 193, 463, 471 I. P C. and directed them to be sent to a Magistrate for inquiry, it was held that the Munsiff's order was a complaint within the meaning of this section—7 All 871 Where a Magistrate ordered the prosecution of a person, and sent the case to another Magistrate for inquiry it was held that the order must be deemed to be a complaint under Sec 476—7 Mad. 189 Where a Civil Judge trying a rent suit was of opinion that a party to the suit had committed perjury and sent the record to the Collector for starting a case under Sec 193 I P C., it was held that the order was a complaint, though it was not an order under Sec 476—26 All. 514. Where a Judge passed an order to the

following effect—⁴¹ I complain that R filed two false and forged bonds in the Court of Small Causes etc. and sent the papers to the District Magistrate for taking action, it was held that the order of the Judge was a complaint—¹² A. L. J. 881 Where the accused removed the property which had been attached in execution of a decree and on the report of the attaching officer, the District Judge, being of opinion that the accused should be prosecuted, ordered the papers to be sent to the Deputy Commissioner, it was held that the order of the District Judge operated as a complaint—¹⁹⁰⁴ P. L. R. 7 Where a Munsiff, being of opinion that a document filed in a case before him had been tampered with, communicated his suspicions to the District Judge who thereupon wrote to the District Magistrate requesting him to take action, it was held that the letter of the District Judge amounted to a complaint—³⁵ All. 8 Where the District Judge forwarded to the District Magistrate a copy of his judgment, with a letter in which he called attention to the remarks as regards the forgery of a will and requested the latter to take up the matter for judicial investigation, the letter was a sufficient complaint—²⁰ Bom. L. R. 1018

Subordination of Public servants—The subordination of one public servant to another may arise either from express enactment or from the fact that both the public servants belong to the same department, one being superior in rank to another—¹⁸ M. L. J. 484

A constable is subordinate to the Superintendent of Police—¹⁹ W. R. 33 the District Magistrate is at the head of the Police, and the Police is subordinate to him—¹⁰ A. W. N. 167, ²⁷ All. 292, ¹⁹¹⁰ P. R. 6, (*Contra*—²⁷ Cal. 452) The Secretary of a Municipal Board is subordinate to the Chairman—¹² A. W. N. 31 The Registrar of Small Cause Court is subordinate to the Chief Judge of that Court—²⁷ Bom. 130

A station House Officer is not subordinate to the Taluk Magistrate—⁶ Mad. 146, the Police is not subordinate to the Honorary Magistrate—¹⁵ A. W. N. 152 ¹⁹ W. R. 33 or to the Township Magistrate—¹ L. B. R. 101 Neither the Police nor the Sub Magistrate is subordinate to the Sessions Judge—²⁷ M. L. J. 186 A village Munsiff or village Magistrate is not subordinate to a Sub Magistrate—¹⁸ M. L. J. 584 (dissenting from ⁴ Mad. 241)

Clause (b)—Perjury In making a complaint against a witness for perjury the Court should remember that the statement must be intentionally false in order to justify a prosecution—² A. L. J. 836, ² P. L. T. 311 The essential ingredient of the offence is the intention of the person—³ C. W. N. 81

Again the statement alleged to be false must have a bearing upon the matter in issue. When the question is neither material to the

issue in the case nor goes to the credit of the witness, he is not liable to prosecution—2 A L J 836

Prosecution for perjury ought not to be made in respect of a loose or inaccurate statement which is remotely relevant to the case and which is not pressed home to the witness in cross examination—20 Cr L J 564 (All)

A complaint for perjury should not be made by the Court in cases where it will have to determine the question by merely weighing the evidence on both sides—5 P L J 23

A prosecution for offences under secs 193, 467 and 471 I P C in respect of a handnote sued upon may be made even though the suit was compromised after it was heard in part—49 Cal 551

A prosecution for perjury in respect of a piece of evidence should not generally be made where the trial Court and the Appellate Court have taken different views as to its credibility—3 P L T 60

In considering the question whether a prosecution for perjury shall or shall not be made, it is a safe rule to give the witness a *locus penitentiae*, and if he avails himself of it, prosecution is inadvisable—23 A W N 68

Where a Sessions Judge believes the evidence of a witness given before him, but disbelieves the evidence given by him before the committing Magistrate, he should not prosecute for perjury *in the alternative* but he may prosecute for giving false evidence before the Magistrate—2 Weir 166

Contradictory statements —Whether a prosecution should be made for giving false evidence on the ground that the witness made contradictory statements depends upon the circumstances of each case—4 Bur L T 262 The mere fact that a witness made contradictory statements in the course of a single deposition is not a ground of prosecution—2 Weir 169; 4 C W N 249; in such a case the Court should take into consideration the whole deposition—2 Weir 168, and should consider if the contradiction may possibly be due to some confusion or mistake—3 C W N 81 Nor should the Court make a complaint on the mere fact that the witness made two contradictory statements one before the committing Magistrate and another at the trial The Court should consider how the contradiction has happened and why the witness in the trial had resiled from his statement made before the committing Magistrate Where the witness had made false statements before the committing Magistrate but deposed truly at the trial, the High Court refused to prosecute—37 Cal 618 Before making a complaint in respect of contradictory statements it would be necessary and proper to allow the person, against whom the complaint is made, an opportunity to explain the

statements fully and to state the circumstances under which they came to be made—17 Cr L J 93 (All); 3 Loh L J 442

A Court should not prosecute merely where there is a discrepancy between a statement made on oath and a statement made under circumstances in which the witness is not bound to state the truth; *cf* g, where a person made two contradictory statements, one in a petition in which he is not bound to state the truth, and another in a deposition—2 Weir 469.

Where a person made two contradictory statements, one before a Magistrate and another before a subordinate Judge, it is necessary that there should be a proper complaint for prosecution on each branch of the alternative, *ie* one complaint from the Magistrate and another from the subordinate Judge. The Court to which both Courts are subordinate may properly make the complaint where one Court is not subordinate to the other—1890 P R 36, 45 Bom 835

False charges—A complaint for an offence under Sec 211 I. P. C. can be made only when the case is deliberately false, but where the case brought is not false in substance but is bolstered up by false evidence, prosecution should be made for an offence under Sec 196 I P C—7 C L J 169 There must be good grounds for thinking that a false and malicious charge was made and that a prosecution is necessary in the interests of justice—5 C P L R 78

Mere acquittal of the person against whom the charge was made is not sufficient for a prosecution under Sec 211 I P C There must be more than a mere acquittal, there must be a reasonable belief in the mind of the prosecuting Court that there was no foundation whatever for the original charge, there must be a belief that in instituting the criminal proceedings the accused had acted knowingly without belief in the truth of the allegations made by himself and recklessly without caring whether the allegations were true or false—4 P L J 374

Before making a complaint for bringing a false case, it is necessary that the case must be judicially determined, the original case must be disposed of according to law before proceedings are taken for prosecution for false charge—3 C W N 758, 5 C W N 254, 14 C W N 765, 26 All 340, 3 C W N 490, A Magistrate is not competent to order the prosecution of the complainant for making a false complaint unless that complaint is dismissed as false—3 C. W N 758, 1912 P R. 2. If the original case is not tried out and never dismissed on evidence taken, the prosecution is invalid—4 O C 127

False claim—Before prosecuting a person under sec 209 I P C for bringing false claim, that person should be allowed an opportunity

of proving his claim, a prosecution should not be made when that person has been thwarted in his attempt to establish the correctness of his claim by the unwarranted activities of the Police acting as the agent of the other party—3 Lah L J 537

Offences committed before police —Complaint by Court is necessary when the offences referred to in this clause are committed in or in relation to any *proceeding in Court*, it is not necessary when the offence is committed in *police proceedings*, e g when a false charge is made to the Police and has not been followed by a judicial investigation thereof by a Court—43 Cal 1152, 7 Mad 292, 2 Weir 162 26 Cal 786 3 C W N 33, 4 Cal 869, 25 W R 33 1905 P R 12 Ratanlal 704 30 All 58, 10 Mad 232 If however the information to the police was followed by a complaint to the Court based on the same allegations and on the same charges as that contained in the information to the Police, and the complaint was investigated by the Court and found to be false, a complaint of the Court would be necessary for prosecuting the false complainant because it was an offence committed in relation to a proceeding in Court—44 Cal 650 33 Cal 1, 14 Cal 707 10 C L J 564 6 L B R 50

"In relation to" —The words 'in relation to' in this clause are very general and are wide enough to cover a proceeding in contemplation before a Criminal Court though the proceeding may not have begun when the offence was committed—24 Bom L R 1153

Court —The word "Court" in this section has a wider meaning than a Court of Justice as defined in the Penal Code Having regard to the obvious purpose for which this section was enacted the widest possible meaning should be given to this word, and it will include a tribunal empowered to deal with a particular matter and authorised to receive evidence on that matter in order to come to a determination—45 Cal 585, 17 Cal 872, 11 C W N 909

What are 'Courts' —A Collector acting in appraisement proceedings under Secs 69 and 70 of the Bengal Tenancy Act—17 Cal 872 a certificate Officer acting under section 6 of Bengal Act I of 1895 (Public Demands Recovery Act)—28 Cal 217 a Tahsildar holding an enquiry as to whether a transfer of names in a land register should be made or not is a Court, since he is authorised under Madras Act III of 1869 to receive evidence and to come to a judicial determination as to whether the transfer should be made or not—24 Mad 121 a village Munsiff trying a case under Regulation IV of 1816—11 Mad 375 a Registrar of Presidency Small Cause Court of Calcutta is a Court, since he is entitled to decide the question of service of summons, and is entitled to receive evidence in order to come to a finding on that matter—18 C W N 1323.

a District Judge acting under Sec 22 Bombay District Municipalities Act III of 1901—37 Bom 363, an Income Tax Collector—38 Bom 642, 35 Mad 72, 1905 P R 44, a tribunal constituted by the Calcutta Improvement Act (V of 1911)—45 Cal 585, a Deputy Commissioner acting under Rule 5 (ii) or 5 (iii) of the Rules made under sec 240 of the Punjab Municipal Act (III of 1911)—22 Cr L J 525 (Lab.)

What are not Courts—A Collector or Deputy Collector acting under the Land Acquisition Act—27 Cal 820, 30 Cal 367 C W N 249, a Collector to whom an application is made to replace a damaged stamp—11 W R 45, a Commissioner appointed for the examination of a witness—11 C W N 909, an arbitrator appointed by the Court—17 M L J 420 1914 P R 3, a Registration officer—11 Cal 566 10 C W N 222 a Police officer examining a person under section 161 in the course of an investigation—11 Bom 659 a Police Patel—4 Bom 479 an Excise Collector—10 C W N 220 an Assistant Collector holding a departmental inquiry under the Bombay Land Revenue Code into the misconduct of a subordinate—22 Bom 936 a Collector in administrative capacity—42 All 130, a certificate officer acting under the Public Demands Recovery Act—2 Pat 257 (but see 28 Cal 217 cited above), a Naeb Tahsildar acting in his administrative capacity as Revenue officer and not in his judicial capacity as a Revenue Court is not a Court within the meaning of this section—1915 P R 18, a Magistrate passing order under section 144 of this Code does so as a public servant and not as a Court—44 M L J 328

What Court can make complaints—The only Courts that can make complaints for prosecution for an offence are those before which the alleged offence was committed or the Courts to which such Courts are subordinate—6 Cal 640

As a general rule complaints should be made in the first instance by the Court before which the offence is alleged to have been committed—6 M H C R 92, 3 C W N 33, 22 W R 11, 16 All 80 8 A W N 132, 3 A W N 224, 9 Bur L T 202 1879 P R 29 But a complaint may be made in the first instance by the superior Court, even though no complaint was made by the subordinate Court the Court before which the offence was committed—27 Mad 273 11 A L J 11 Thus the High Court can make a complaint while exercising its powers of revision—25 M L J 593 16 Cr L J 740 (Mad) But it is extremely undesirable that the High Court should do so except under very exceptional circumstances—17 W R 46

Transfer of Judge—As a matter of convenience and expediency, the complaint should be made by the Judge who tried the case, if he is present, if he is not present, it may be made by any other Judge of

the same Court—33 Cal 193, 7 A L J 50 The complaint may be made by the *successor in office* of the Judge who tried the case in which the offence was committed—34 Cal 551, 5 C L J 176, 11 C W N 119, 7 M H C R App 12 *Contra*—22 A W N 9

Where a Deputy Magistrate who had tried the case was transferred from the District, and the complaint was made by the District Magistrate, before whom all cases pending before the Deputy Magistrate were placed, it was held that although the cases pending in the Court of the transferred Magistrate were placed before the District Magistrate either for disposal or re distribution among his Subordinate Magistrates still he never became the presiding Judge of the Deputy Magistrate's Court and therefore was not competent to make the complaint—16 Cr L J 640 (Cal) Where there are several Deputy Magistrates at a place and one of them is transferred, the Deputy Magistrate who comes to fill the gap is not the successor in office of the outgoing Deputy Magistrate, and the former cannot make a complaint under this section in respect of an offence committed before the latter—42 Cal 667 An abetment of perjury was committed in the course of an inquiry before a committing Magistrate (who was a first class Magistrate) While the proceedings were pending before him, the Magistrate was transferred and was succeeded by a second class Magistrate (who had no power to commit) The outgoing Magistrate therefore sent the proceedings to the District Magistrate It was held that the District Magistrate had jurisdiction to make a complaint in respect of the offence, for he was "such Court" referred to in clause (b), as he was an officer on whom devolved the disposal or committal of cases in the District—42 Bom 190

Transfer of case—Where a case is transferred to another Court it is the Court which tries the case on the merits that can make the complaint, and not the Court who took cognisance of the case and issued process—6 C W N 35, 3 C W N 33 Where a case is transferred by one Court to another for investigation, the Court which investigated the case is the proper Court to make the complaint and not the Court which transferred the case, since the Court which transferred the case ceased to have jurisdiction in the matter—40 Cal 41, see also 16 C W N 885 But where a false complaint against a public servant made to a Deputy Commissioner, was simply referred (and not transferred) for inquiry and report (under section 202) to a Subdivisional Magistrate, the latter cannot make a complaint for the prosecution of the complainant for bringing a false case—4 C W N 366, 22 M. L. J. 419

Commitment of case —In a case committed to the Sessions, it is the Sessions Court and not the committing Magistrate who can make a complaint for prosecution of a witness who made false statements before the committing Magistrate, because such statements are said to be made in relation to proceedings before the Sessions Court—1917 M W N 141; 2 Weir 160

Court acting in a different capacity —The Collector of a District in deciding a revenue appeal came to the conclusion that a receipt filed in the case was not genuine. He took no steps in this connection as Collector, but acting as the District Magistrate made a complaint. It was held that the act of the District Magistrate was *ultra vires*—40 All 144

Temporary Court —The Court of the City Magistrate not being a permanent one with a perpetual succession of Judges, only the Sessions Judge and not the successor of such Magistrate on his transfer is competent to make the necessary complaint for prosecution for an offence committed before such Magistrate—1918 P R 22

Court abolished and re-established —Where by a notification in the Gazette the Court of the Sub Magistrate at B was abolished and two years afterwards the said Court was restored with its territorial limits somewhat curtailed, it was held that it could not be said that there was any such continuity as would enable the High Court to hold that the Court that was re-constituted was the same as the one that ceased to exist, and consequently the new Court could not make a complaint in respect of an offence committed before the old Court—16 Cr L J 787 (Mad)

No delegation of power —The power to make a complaint must be exercised by the Court before which the offence was committed. The Court cannot delegate the power even to the Public Prosecutor. The filing of a complaint by the Public Prosecutor in the absence of a complaint by the Court, will not be treated as equivalent to a complaint by the Court—1917 P R 19

Clause (c) —Offences under this clause —*Offence described in Sec 463 I P C* —The word 'forgery' is used as a general term in Sec 463 I P C and that section is referred to in a comprehensive sense in this section, so as to embrace all species of forgery punishable under the Penal Code, including one under Sec 467 I P C—12 Bom 36, 14 C W N 479, or an offence under Sec 468 I P C—36 Mad 387, or under Sec 466 I P C—Ratanlal 83, 20 Cr L J 630 (Pat), but it does not include an offence under Sec 474 I P C—19 C W N 125

Document —The word 'document' in this section means the original document. Where the original document which was proved to have been forged, was not produced or given in evidence, but only a registra-

Cr L J 195 (Cal) The Assistant Magistrate is subordinate to the Sessions Judge and not to the District Magistrate—19 All 121

A second or third class Magistrate is subordinate to the District Magistrate and not to any other first class Magistrate—26 Mad 656 27 Mad 124, 30 Cal 394, 2 Lah L J 660 3 N L R 50, 30 All 109, 41 Mad 787, because an appeal from the 2nd or 3rd class Magistrate *ordinarily* lies under Sec 407 (1) to the District Magistrate, and not to any other 1st class subordinate Magistrate to whom the District Magistrate has delegated under Sec 407 (2) his power to hear appeals from 2d or 3rd class Magistrates—Ibid

A Sub Judge is subordinate to the District Judge and not to the High Court—44 M L J 320, 17 A L J 191, 22 O C 189

A Munsiff's Court is subordinate to the District Judge's Court—1898 P R 16, 1900 P R 25, 1916 P L R 67 2 Lah L J 415, but not to the subordinate Judge's Court although appeals from the Munsiff's Court are transferred by the District Judge to the Subordinate Judge's Court—39 Cal 774. (Contra—2 Lah 57) But when under the law or by a notification certain appeals from the Munsiff's decrees lie to a first class Subordinate Judge the Munsiff will be deemed as subordinate not to the District Judge but to the 1st class Sub Judge—1918 P R 29, 28 M L J. 486, followed in 2 Lah 57

The Commissioner's Court at Santhal Parganas is subordinate to the Court of the Commissioner of Bhagalpur, and not to the High Court—30 Cal 916

A first class Magistrate is not subordinate to the District Magistrate but to the Sessions Judge—5 A L J 562, 6 All 98 1902 P R 7 (overruling 1901 P R 30), 1912 P R 2, Ratnmal 511, 24 Bom L R 810, 16 Cr L J. 640 (Cal) A second or third class Magistrate is not subordinate to the first class Magistrate but only to the District Magistrate, see above

A single Judge on the original side of the High Court is subordinate to the Divisional Bench on the Appellate side—45 Mad 978 (F B) 24 Bom L R 817

Where no appeals lie, the original Civil Court will be deemed to be subordinate to the principal Court of original civil jurisdiction Thus, the Provincial Small Cause Court is subordinate to the District Court—39 All 657, 4 P L J 609, 21 C W N 948, 20 O C 223 15 A I J 721 (F B), 42 Ind Crs 593 (Burma), 37 Cal 13 (Contra—2 P L J 1, 1 P L J 207) The Mamlatdar's Court is subordinate to the District Judge—5 Bom L R 206, 9 Bom L R 896 The Presidency Small Cause Court is subordinate to the High Court—36 Mad 138 The village

Munsiff is subordinate to the District Judge—6 A. L. J. 796. It should be noted that the latter part of subsection (3) is now restricted to *civil* Courts only, whereas under the old law, it applied to any court and the words used were "the principal Court of original jurisdiction" which included a Criminal and a Revenue Court, and therefore it was held that in respect of a revenue proceeding under the Agra Tenancy Act, from which no appeal lay, the principal Court of original jurisdiction was the Collector—34 All 197. The present law has made no provision for such cases.

Clause (a) —Where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction would be the Court to which the original Court must be deemed to be subordinate—8 N. L. R. 57. Thus, the Subordinate Judge would be held to be inferior to the District Judge and not to the High Court even though the appeal in the particular instance would lie to the High Court—2 Bom 481, 11 Bom 438. So also the Recorder's Court at Rangoon is subordinate to the High Court for the purpose of this section though in the particular case the appeal may lie to the Privy Council—22 Cal 487.

Subsection (4) —Subsection (4) must be read with subsection (1); and complaint is necessary for the prosecution of an abettor only if he is a party to the proceedings; otherwise not—32 All 74, 38 All 169.

196. No Court shall take cognizance of any offence punishable under Chapter VI or IXA of the Indian Penal Code (except Section 127), or punishable under Section 108A, or Section 153A, or Section 294A, or Section 505 of the same Code, unless upon complaint made by order of, or under authority from, the Governor-General in Council, the Local Government, or some officer empowered by the Governor-General in Council in this behalf.

Prosecution for offences against the State

Change —The word "or IXA" have been added by sec 3 of Act XXXIX of 1920 (Election Offences and Inquiries Act).

A complaint of an offence under section 171E (falling under Chapter IXA) of the I. P. C. requires a sanction under this section—42 M. L. J. 139.

Complaint —A complaint which did not set forth the concrete facts relied on as constituting the offences but merely copied out the words of the sections of the Penal Code was held to be defective—16 C. W. N. 1105. But it is not necessary that the complaint must consist of allegations made on *oath* or reduced to *writing*—35 Cal 141.

A letter of a Local Government according sanction for prosecution of

a certain person under sec. 121 I. P. C. is not a complaint, though it may be taken as an authority to make a complaint—1890 P. R. 16. The person who signs the letter of authority is not the complainant, and it is not necessary to take his examination under the law. The person who armed with the authority makes the application to the Court for the apprehension of the accused is the complainant and his examination is to be taken. A Presidency Magistrate need not at that stage administer oath to the complainant, nor reduce his complaint into writing—35 Cal. 141.

Order or authority —The sanction of the Local Government must be strictly proved according to the provisions contained in sec. 78, Evidence Act, and the prisoner named in the sanction must be identified—I Bur. S. R. 389.

Form, and contents —This section does not prescribe any particular form of order and does not even require the order to be in writing—22 Bom. 112. A telegram sent by Government expressly authorising the Public Prosecutor to file a complaint against the accused for an offence under section 124A I. P. C. is a perfectly valid authority—42 Mad. 180.

The sanction under this section need not be very particular about its contents, provided its meaning and intention are clear. Where the letter of authority sanctioning prosecution for sedition did not specify the *name* of the printer of the newspaper, but he was indicated from the first and his name was supplied at the commencement of the Police Court proceedings, it was held that this was a sufficient compliance with the section—35 Cal. 141. A sanction for the prosecution of the accused in the alternative for offences under section 121 or 121A is not defective on the ground that it does not specify with sufficient clearness the section or the offence in respect of which it is given—42 M. L. J. 108. Where the persons to be prosecuted were named, the offences and the period of their activity specified and the particular sections of the Penal Code set out, the mere circumstance that these persons were not described as the members of the Revolutionary society the existence of which was sought to be proved at the trial did not affect the validity of the sanction—16 C. W. N. 1105. In a prosecution for sedition, if the sanction contains the name of the printer, publisher, editor etc. of the newspaper, the name of the newspaper, the offence committed and the particular section of the Penal Code and refers to "certain articles" appearing in the newspaper, the fact that the sanction does not specify the *exact article* complained of does not make the sanction insufficient or invalid—22 Bom. 112. Where the sanction contained a misdescription of the articles on which the prosecution was based, and this was rectified by a subsequent sanction

filed in the course of the trial, it was held that the petitioner was not prejudiced and the defect was cured by sec. 537—35 Cal 141

It is not necessary that the actual words of the complaint should be sanctioned—42 Mad. 180; 3a Mad. 3.

Where the telegram sent by the Local Government expressly authorised the Public Prosecutor to file a complaint against V. under sec. 124A I. P. C. and to act immediately if the District Magistrate thought it advisable after consulting him, and formally enjoined the District Magistrate to submit the complaint prepared "*for issue of supplemental sanction*," held that the last sentence must be read apart from the first portion of the telegram and did not limit the authority given, and that a complaint filed in pursuance of that telegram but without any supplemental sanction was not illegal—42 Mad. 180.

Where the authority to prosecute was not given to any determinate person, but the order sanctioning the prosecution was communicated to the District Magistrate the public prosecutor and the senior special Judge, and a prosecution was initiated by the Additional Public Prosecutor, held that the fact that the order of authorisation was not given to any determinate person did not affect the legality of the trial, and that the alleged defect in the order was curable by sec. 537 of the Code—44 M L J 166

Signature—The authority under sec. 196 need not in the case of a Local Government, be signed personally by the Lieutenant Governor; it is enough, if it is signed by one of his accredited or Gazetted officers—35 Cal. 141. The sanction must be signed by the Chief Secretary to the Government. An order signed by the Deputy Secretary on behalf of the Chief Secretary is not legal—50 Cal 135

Local Government—The sanction must in order to satisfy the section have been the act of the Local Government, and not of a single member of such Government—42 Mad 885

Want of sanction and complaint—Absence of sanction under this section vitiates the whole proceedings, and the defect is not cured by sec 537. A trial without sanction under sec 196 or 197 is illegal—31 Mad 80, 1908 I' R 8

Where there was no sanction (or where the sanction was not given until long after the institution of proceedings) and no complaint, the whole proceedings in the trial are likewise void *ab initio*, and this defect is not cured by the provisions of Sec 537—1890 P. R. 16, 1894 P. R. 42, 37 Cal 467, 42 Mad 885

So also, absence of complaint or irregularity in complaint makes the whole proceedings void *ab initio*. The defect goes into the root of the

matter and makes it impossible for the Court to go on and hold a valid trial for the offence—16 C W N 1105 If however, no objection is taken to the absence or irregularity of the complaint, at the trial, but is taken in appeal or revision proceedings, the defect will not affect the trial, and the irregularity or insufficiency of the complaint will be cured by Sec 537—1908 P R 8, 16 C W N 1105

Prosecution for other offences not mentioned in sanction — Where an order under section 196 authorised a particular Police officer to prefer a complaint of "offences under Secs 121A, 122 I P C or under any other section of the said Code which may be found applicable to the case and the Magistrate prosecuted the accused and committed him in respect of an offence under Sec 121 I P C, it was held that since the offence under Sec 121 requires a sanction under this section, and it was not specifically mentioned in the sanction, the commitment in respect of an offence under Sec 121 was illegal—37 Cal 467 The reason is that the power and discretion of determining whether cognisance shall be taken in respect of an offence mentioned in this section can not be delegated by the Local Government to any other body of persons and if the Magistrate is allowed to prosecute a person for an offence referred to in this section, when such offence was not specifically mentioned in the sanction, it means a delegation of power to the Magistrate which cannot be sustained—37 Cal 467 But a sanction under Sec 124A authorises a prosecution under Secs 124A and 114 I P C—32 Mad 3

So also, it is not illegal to prosecute without a sanction a person for an offence for which no sanction is necessary, thus, where a person has committed an offence under Sec 122 I P C and by the same act abetted the offence of dacoity, the fact that the Government refused sanction for the former offence would be no bar to his prosecution for the minor offence of abetting dacoity for which no sanction is necessary—25 Bom 50

196 A No Court shall take cognizance of the offence of criminal conspiracy punishable under Section 120 B of the Indian Penal Code,

Prosecution for certain classes of criminal conspiracy

- (1) in a case where the object of the conspiracy is to commit either an illegal act other than an offence or a legal act by illegal means, or an offence to which the provisions of Section 196 apply, unless upon complaint made by order of or under authority from the Governor General in

Council, the Local Government or some officer empowered by the Governor General in Council in this behalf, or

- (2) in a case where the object of the conspiracy is to commit any non-cognizable offence, or a cognizable offence not punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, unless the Local Government, or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the Local Government has, by order in writing, consented to the initiation of the proceedings

Provided that where the criminal conspiracy is one to which the provisions of sub section (4) of Section 195 apply no such consent shall be necessary

Scope —This sections applies only to a prosecution for conspiracy punishable under section 120 B of the Penal Code, and not for abetment by conspiracy punishable under section 109 of that Code—49 Cal 573

196 B *In the case of any offence in respect of which the provisions of Section 196 or Section 196 A apply, a District Magistrate or Chief Presidency Magistrate may, notwithstanding anything contained in those sections or in any other part of this Code, order a preliminary investigation by a police officer not being below the rank of Inspector, in which case such police officer shall have the powers referred to in Section 155, sub-Section (3)*

Preliminary Inquiry in certain cases

This section has been added by sec 49 of the Criminal Procedure Code Amendment Act (VIII of 1923)

'This new section is designed to meet the difficulty which arises from the fact that cases under sections 196 and 196A cannot be properly investigated by the Police before complaints are made. Doubts have arisen as to whether investigation can be ordered under section 155 (2) by a Magistrate without his taking cognizance of the case. The new section will provide for a preliminary investigation. We recognize that it does not altogether meet the case where the desirability of adding a new charge arises in the Sessions Court. It has been suggested that this difficulty

might be met to some extent by substituting the words "proceed to the trial" for the words 'take cognizance' in sections 196 and 196 A. But on the whole, we prefer not to make this change and to leave the sections unaltered — *Report of the Joint Committee (1922)*

197 (1) When any Judge, or any public servant not removeable

Prosecution of Judges and public servants

from his office without the sanction of the Government of India or the Local Government, is accused as such Judge or public servant of any offence, no Court shall take cognizance of such offence, except with the previous sanction of the Government having power to order his removal, or of some officer empowered in this behalf by such Government, or of some Court or other authority to which such Judge or public servant is subordinate, and whose power to give such sanction has not been limited by such Government

197 (1) When any person who is a Judge within the meaning of

Prosecution of Judges and public servants

Section 19 of the Indian Penal Code, or when any Magistrate, or when any public servant who is not removeable from his office save by or with the sanction of a local Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Government

(2) Such Government may determine the person by whom, the manner in which the offence or offences of which, the prosecution of such Judge, *Magistrate* or public servant is to be conducted, and may specify the Court before which the trial is to be held

Power of Government as to prosecution

Change — The whole of subsection (1) has been re drafted by sec 50 of the Criminal Procedure Code Amendment Act, 192. It has been pointed out to us that difficulties with regard to section 197 have recently

come to light. There are certain public servants who are only removable from office by the Secretary of State, and it is unreasonable that they should obtain no protection under the section. Further, in view of section 4 (2) of the Code, the word "Judge" has to be interpreted according to the definition given in section 19 of the Indian Penal Code, with the result that Magistrates acting in certain capacities under the Code, *e.g.*, when holding inquiries, obtain no protection. We have therefore, proposed a re draft of subsection (1) of section 197 to meet these difficulties. We have confined the operation of the section to public servants removable by a Local Government or some higher authority and have provided that the sanction required for a prosecution will be the sanction of the authority which has power to remove"—*Report of the Joint Committee (1922)*

'While acting ... official duty'—These words were suggested by the Bill of 1914, in order to make the sense clear, reverting to the wording of the 1872 Code.

Judge—In section 19 of the Indian Penal Code, the word 'Judge' has been thus defined—

"The word *Judge* denotes not only every person who is officially designated as a Judge, but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or judgment which, if not appealed against, would be definitive, or a judgment which if confirmed by some other authority, would be definitive, or who is one of body of a persons, which body of persons is empowered by law to give such a judgment

Illustration—A collector exercising jurisdiction under the Tenancy Act, A Magistrate exercising jurisdiction in respect of which he has power to pass sentence, or to commit for trial, A member of a panchayet who has power to try and determine suits "

A village Magistrate exercising jurisdiction and trying an offender, under Regulation IX of 1816 is a Judge within the meaning of this section—23 Mad 540. A Village Munsiff trying a civil suit and ordering attachment before judgment is acting as a Judge—17 Cr L J 394 (Mad). A Magistrate of a Village Panchayet constituted by Madras Act 11 of 1920 is a Judge—42 M L J 139.

Public Servant—Any person, whether receiving pay or not, who chooses to take upon himself the duties and responsibilities belonging to the position of a public servant and performs those duties and accepts those responsibilities, and is recognised as filling the position of a public servant, must be regarded as such. A volunteer in Tahsildar's office is a public servant—8 All 201. A committing Magistrate is a

public servant though not a Judge—6 M H C R App 21 (But he is also a Judge See Illustration to section 191, P C cited above) The Chairman of a Municipality is a public servant—1 Weir 243 So also a Chairman of a Union Panchayet—1916 M W N 384 A Municipal Commissioner is a public servant—1890 P R 14, see also illustration to Sec 211 P C But every Municipal Commissioner is not a public servant within the meaning of this section The Court should not, without any reliable evidence on the record, assume that every Municipal Commissioner is not removable from his office without the sanction of the Local Government—1916 P W R 48 But a Municipal Corporation (*e g* the Calcutta Municipality) is not a public servant and may be prosecuted like a private person without a sanction—3 Cal 758 So also, no sanction is necessary to prosecute a Municipal Chairman Delegate for acts done by him in that capacity, because the protection afforded by this section does not extend to a person to whom a public servant may delegate a portion of his powers—2 Weir 276 A forest Ranger in the C P is not a public servant not removable without sanction of the Local Government—23 Cr L J 397 (Nag)

'Not removable from his office'—The words 'not removable from his office' etc have reference only to the expression 'public servant' and not to "Judge" This is now made clear by the wording of the present section So the sanction of the Government is necessary for the prosecution of *any* Judge, if a complaint is made against him as such Judge, whether he is removable from the office without the sanction of the Government or not—6 M H C R App 21

The following public servants are removable without the sanction of Government, and no sanction is necessary in respect of their prosecution—1 Police Patel in Bombay—4 Bom 357 2 Suboverseer in the Madras Presidency—12 M I T 351

The Chairman of a Union Panchayet is a public servant not removable from his office without the sanction of the Local Government even though the power of removing him has been delegated by the Government to the President of the District Board The delegation of the power of removal means only that the Local Government performs that act itself through the medium of a particular officer (President of the District Board) as the channel through which it is done—1916 M W N 384

<p>'Acting in the discharge of official duty'—The sanction of the Local Government is not necessary if the offence committed by the judge, public servant who act in the discharge of</p>	<p>The sanction of the Local Government is not necessary if the offence committed by the judge, public servant who act in the discharge of</p>
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See 26 Cal 852, 25 Mad 15, 13 C P L R 126, 1916 M W N 384. Where a Judge commits an offence from the Bench which could be committed by anybody and which entails consequences neither in the way of penalty nor anything else in the least different, because a Judge committed it, from what it would entail if committed by anybody else, sanction is not required under this section for his prosecution—1916 M W N 384. Thus, where a Village Magistrate uses his authority and position *as a public servant* to constrain a person to give a bribe, sanction is certainly necessary for his prosecution—2 Weir 221. But if the Village Magistrate is charged with having committed extortion not while acting in the capacity of a public servant, no sanction is necessary—6 M L T 128, 7 B H C R. 61. A Village Magistrate who fabricates a record in which he figures as a Judge cannot properly be said to be acting in the discharge of this official duty when he does so, because the Village Magistrate is not required to make any record, and therefore if he fabricates a false record alleging that a certain person had committed a particular offence and convicting him, no sanction is necessary for his prosecution for such fabrication—32 Mad 435. A Village Magistrate while he is preventing an altercation and suppressing a riot is said to be acting in the discharge of his official duty, and sanction is necessary to prosecute him for any hurt caused by him while suppressing the riot. The ruling in 23 Mad 540 is no longer good law.

Where a Magistrate used abusive language towards another Magistrate while both of them were trying a case as members of a Bench, it was held that no sanction was necessary because the offence was not committed *as Magistrate*, i. e. the position of being a Magistrate was not a necessary element of the offence—2 Bom L R 1079. So also, where the Administrator General of Bengal was appointed administrator to the estate of a private person it was held that the offence committed by him in relation to that estate was not committed by him in his official capacity as Administrator General and no sanction was therefore necessary—30 Cal 927. Where the Chairman of a Union Panchayat committed criminal breach of trust in respect of Union funds, the offence was one committed by him in the discharge of his official duty and sanction is necessary. The contrary view taken in 1916 M W N 384 is no longer correct. Where a Union Chairman while removing an obstruction to a public thoroughfare caused by the complainant used insulting and abusive language towards him, sanction is necessary for the prosecution of the Chairman. The ruling in 4 L W 556 is no longer correct.

It cannot be said that whenever a Judge or public servant *exceeds the limit of his power* he is not within the protective provisions of this sec.

it, such as is required by this section—10 All 39 So also, the Magistrate cannot *alter* a charge under section 501 I P C to one under section 500 I P C, when there was no complaint in respect of the latter offence—1889 P R 18

But a contrary view has been taken in the cases noted below Thus in a Panjab case it has been held that having regard to the substance of the complaint, the Magistrate is competent to alter a charge under sec 211 I P C to one under sec 500 I P C—1884 P R 24 The principle is that a complaint need not state precisely the section of the Penal Code under which the accused shall be charged, it is enough, if the complainant lays before the Magistrate facts which if proved would warrant a commitment under any of the sections referred to in this section—25 All 209 Thus, where the husband of a woman who had committed bigamy made a complaint to the Magistrate alleging facts which seemed to constitute an offence under sec 498 I P C but in the subsequent inquiry it appeared that an offence under sec 494 I P C was committed, it was held that the Court could take cognisance of the offence under sec 494 without a fresh complaint—25 All 209, 1 C L R 523 This section is clearly designed to prevent Magistrates from inquiring on their own motion into a case connected with marriage unless the husband or other person authorised moves them to do so, but when the case is once properly instituted before the Magistrate he can proceed in respect of any other offence proved or against any other person implicated—1 C L R 523

Power of Appellate Court to alter charge—An Appellate Court can under sec 423 alter a conviction under one section into one under another section and in doing so it is not bound by such restrictions as for instance, a complaint by the aggrieved person Thus it can convert a conviction under sec 182 into one under sec 500 I. P C. notwithstanding that there was no complaint in respect of the latter offence by the aggrieved person as required by this section—25 All 534

Taking cognisance of abetment—A Magistrate taking cognisance of abetment of the offences mentioned in this section must be deemed to have taken cognisance of the substantive offences and therefore a complaint by the aggrieved person is a condition precedent to taking cognisance—1888 P R 4

Person aggrieved—*Defamation*—The question is to whether the complainant is the person aggrieved by the offence alleged within the meaning of this section is to be determined by the nature of the offence and the special circumstances of each case—3 C. L J 38 If a married woman is defamed, ordinarily the husband is the person aggrieved by the

defamation of his wife—14 Mad. 379; 25 Bom. 151; 1882 P. R. 20; 15 M. L. J. 224; 2 Weir 231. If, however, the husband is a lunatic and the woman is living in the house and under the protection of her father-in-law, any allegation against the daughter-in-law seriously affects the reputation and status in society of the father-in-law, and he is a person aggrieved within the meaning of this section and is competent to institute a complaint—3 C. L. J. 38. (This is now expressly provided by the recent amendment) Where a Hindu lady is living with her father, brother or son, she is a member of that family and her reputation is bound up with the reputation of the person in whose house and under whose charge she is living, and any imputation as to her character will affect as much the relative with whom she is living as herself. Therefore, the brother of a Hindu widow, with whom she has been living, is an aggrieved person in respect of an imputation of unchastity made against the woman—32 Cal 425. In 13 A W N 207, however, it has been held that the son is not an aggrieved person in respect of a defamation of his mother.

Where certain allegations made in a newspaper against A and certain others were true as regards A but untrue as regards the others, it was held that A was not the person aggrieved by the publication of the allegations—1914 M. W. N. 351.

Where a newspaper published statements, which were alleged to be defamatory, of specific acts of negligence on the part of the Health Officer and his subordinates, it was held that the President of the Municipality was not a person aggrieved within the meaning of this section merely because he had a control over those officers, and that by the imputation made against his subordinates, his own conduct and administration had not been impugned—26 Mad 43.

The words 'person aggrieved', in case of defamation must be treated as equivalent to "person injured," the object of the section being to limit the right of complaint to the person who suffered injury. Therefore, the founder of a monastery is incapable of making a complaint in respect of a defamatory statement affecting the moral character of a certain *Pongy*, who presided over the monastery—1 Bur S R 617.

The complaint in respect of defamation must be made by the person aggrieved and not by his official superior—9 O L J 342=23 Cr. L. J.*641.

The grievance referred to in the words "person aggrieved" does not contemplate any fanciful or sentimental grievance; it must be such grievance that the law can appreciate, it must be a legal grievance and not a *stat fororacione voluntas reason*—3 C L J 38.

Death of complainant in defamation :—The death of the complainant,

during the course of the criminal proceedings for defamation, necessarily terminates those proceedings—1908 P R 10

Person aggrieved by bigamy—In the case of an offence of bigamy committed by the wife, the husband is the only person aggrieved by such offence, and he alone can make the complaint—2 Weir 231, 26 Cal 336 But the father of the husband is not the person aggrieved—32 All 78, 40 also the brother of the husband is not the person aggrieved—25 All 132, 10 Bom 340 11 O C 148 Prior to the present amendment, it was held that if the husband of the girl who committed bigamy was a minor, his mother was not competent to make a complaint as she was not the person aggrieved—2 Weir 231 it was also held that if the husband was a lunatic, his brother could not make a complaint on his behalf—26 Cal 336 These cases are now rendered obsolete by the proviso newly added in this section

199 No Court shall take cognizance of an offence under Section 497 or Section 498 of the Indian Penal Code except upon a complaint made by the husband of the woman, or, in his absence, *made with the leave of the Court* by some person who had care of such woman on his behalf at the time when such offence was committed

Prosecution for adultery or enticing a married woman

Provided that, where such husband is under the age of eighteen years, or is an idiot or lunatic, or is from sickness or infirmity unable to make a complaint, some other person may, with the leave of the Court, make a complaint on his behalf

Change—The italicised words have been added by sec 52 of the Criminal Procedure Code Amendment Act, 1923

Object of Section—The restriction imposed in this section (empowering only the husband or the guardian to make the complaint) is not to afford immunity or protection to the offender, but to prevent a person unconnected with the woman from giving publicity to a matter which neither the husband nor the guardian is willing to agitate—17 Cr L J 363 (Mad)

Scope of section—The only offences referred to in this section are offences under secs 497 and 498 I P C, but a charge of *house trespass* with intent to commit adultery is not contemplated by this section, and such an offence may be inquired into without complaint by the husband of the woman concerned, although a prosecution for the offence of adultery must be instituted by the husband alone—1 Weir 531 *Contra*

—6 A. W. N. 42, where it was held under similar circumstances, that a prosecution for house trespass with intent to commit adultery with a woman was injudicious, in the absence of a complaint by the husband of the woman.

The complaint referred to in this section means a complaint as defined in sec. 4 (h). Information lodged by the complainant before the Police is not a complaint sufficient to warrant a conviction under secs. 497 and 498 I. P. C.—30 Cal. 910, 17 C. P. L. R. 105, 2 Weir 235, 43 M. L. J. 564. But where on a charge under sec. 366 I. P. C. the Police took up the proceeding in which the husband appeared as a witness and he asked the Magistrate to drop the proceedings thereunder but said that he intended to prosecute the accused under sec. 498 I. P. C. and to get him punished, it was held that there was a complaint, in as much as he made an allegation before the Magistrate that the offence should be inquired into—38 All. 276.

Again, the complaint referred to in this section is a complaint by the husband of the *specific offences* mentioned in this section, and not a complaint of any offence—27 Mad. 61. If the husband brings a complaint of any other offence, and from certain statements in his deposition it appears that an offence mentioned in this section has been committed, no conviction of the latter offence can be sustained, because the husband has not made a formal complaint of that offence. Thus, where the husband preferred against the accused a complaint of rape on his wife, but not of adultery, and certain statements in this deposition disclosed an offence of adultery, a conviction for the latter offence was illegal, in as much as the husband had not preferred a formal complaint of adultery, even the circumstance of the husband appearing as a witness in the case could not be regarded as amounting to the institution of a complaint for adultery—5 All. 233, 29 Cal. 415, 1883 P. R. 10. Similarly, where the accused was charged with offences under secs. 366 and 379 I. P. C. and from statements in the deposition of the husband of the woman concerned, an offence under sec. 498 was made out, a conviction for that offence was illegal, in the absence of a formal complaint by the husband—14 Bom. L. R. 141. Even the formal assent of the husband to a charge of adultery, added at the end of his deposition would not probably be a formal compliance with this section—24 W. R. 18. Where a husband charged the accused persons with theft and theft only, they could not be convicted of an offence under sec. 498 I. P. C. as there was no complaint preferred by the husband under this section in respect of the latter offence—1918 P. R. 2. (In Ratanlal 584, however, it was held that the word 'complaint' in this section must be taken as including not only a written complaint but also the examination of the complainant, at any rate, prior

during the course of the criminal proceedings for defamation, necessarily terminates those proceedings—1908 P. R. 10 .

Person aggrieved by bigamy —In the case of an offence of bigamy committed by the wife, the husband is the only person aggrieved by such offence, and he alone can make the complaint—2 Weir 231, 26 Cal 336 But the father of the husband is not the 'person aggrieved—32 All 78, so also the brother of the husband is not the person aggrieved—25 All 132, 10 Bom 340, 11 O C 148 Prior to the present amendment, it was held that if the husband of the girl who committed bigamy was a minor his mother was not competent to make a complaint as she was not the person aggrieved—2 Weir 231 it was also held that if the husband was a lunatic, his brother could not make a complaint on his behalf—26 Cal 336 These cases are now rendered obsolete by the proviso newly added in this section

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Scope of section —The only offences referred to in this section are offences under secs 497 and 498 I P C, but a charge of *house trespass* with intent to commit adultery is not contemplated by this section, and such an offence may be inquired into without complaint by the husband of the woman concerned, although a prosecution for the offence of adultery must be instituted by the husband alone—1 Weir 531 *Contra*

—6 A W N 42, where it was held under similar circumstances, that a prosecution for house trespass with intent to commit adultery with a woman was injudicious, in the absence of a complaint by the husband of the woman

The complaint referred to in this section means a complaint as defined in sec 4 (h) Information lodged by the complainant before the Police is not a complaint sufficient to warrant a conviction under secs 497 and 498 I P C—30 Cal 910, 17 C P L R 105, 2 Weir 235, 43 M L J 564 But where on a charge under sec 366 I P C the Police took up the proceeding in which the husband appeared as a witness and he asked the Magistrate to drop the proceedings thereunder but said that he intended to prosecute the accused under sec 498 I P C and to get him punished, it was held that there was a complaint, in as much as he made an allegation before the Magistrate that the offence should be inquired into—38 All 276

Again, the complaint referred to in this section is a complaint by the husband of the *specific offences* mentioned in this section, and not a complaint of any offence—27 Mad 61 If the husband brings a complaint of any other offence, and from certain statements in his deposition it appears that an offence mentioned in this section has been committed, no conviction of the latter offence can be sustained, because the husband has not made a formal complaint of that offence Thus where the husband preferred against the accused a complaint of rape on his wife, but not of adultery, and certain statements in this deposition disclosed an offence of adultery, a conviction for the latter offence was illegal, in as much as the husband had not preferred a formal complaint of adultery, even the circumstance of the husband appearing as a witness in the case could not be regarded as amounting to the institution of a complaint for adultery—5 All 233, 29 Cal 415, 1883 P R 10 Similarly, where the accused was charged with offences under secs 366 and 379 I P C and from statements in the deposition of the husband of the woman concerned an offence under sec 498 was made out, a conviction for that offence was illegal, in the absence of a formal complaint by the husband—14 Bom L R 141 Even the formal assent of the husband in a charge of adultery, added at the end of his deposition would not probably be a formal compliance with this section—24 W R 18 Where a husband charged the accused persons with theft and theft only, they could not be convicted of an offence under sec 498 I P C as there was no complaint preferred by the husband under this section in respect of the latter offence—1918 P. R. 2 (In Ratanlal 584, however, it was held that the word 'complaint' in this section must be taken as including not only a written complaint but also the examination of the complainant, at any rate, prior

during the course of the criminal proceedings for defamation, necessarily terminates those proceedings—1908 P. R. 10.

Person aggrieved by bigamy :—In the case of an offence of bigamy committed by the wife, the husband is the only person aggrieved by such offence, and he alone can make the complaint—2 Weir 231, 26 Cal 336. But the father of the husband is not the "person aggrieved"—32 All 78; so also the brother of the husband is not the person aggrieved—25 All. 132; 10 Bom. 340, 11 O C 148. Prior to the present amendment, it was held that if the husband of the girl who committed bigamy was a minor, his mother was not competent to make a complaint as she was not the person aggrieved—2 Weir 231, it was also held that if the husband was a lunatic, his brother could not make a complaint on his behalf—26 Cal 336. These cases are now rendered obsolete by the proviso newly added in this section.

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Prosecution for adultery or enticing a married woman.

Indian Penal Code, except upon a complaint made by the husband of the

woman, or, in his absence, *made with the leave of the Court* by some person who had care of such woman on his behalf at the time when such offence was committed

Provided that, where such husband is under the age of eighteen years, or is an idiot or lunatic, or is from sickness or infirmity unable to make a complaint, some other person may, with the leave of the Court, make a complaint on his behalf.

Change —The italicised words have been added by sec 52 of the Criminal Procedure Code Amendment Act, 1923

Object of Section :—The restriction imposed in this section (empowering only the husband or the guardian to make the complaint) is not to afford immunity or protection to the offender, but to prevent a person unconnected with the woman from giving publicity to a matter which neither the husband nor the guardian is willing to agitate—17 Cr L J 363 (Mad)

Scope of section :—The only offences referred to in this section are offences under secs 497 and 498 I P. C., but a charge of *house trespass* with intent to commit adultery is not contemplated by this section, and such an offence may be inquired into without complaint by the husband of the woman concerned, although a prosecution for the offence of adultery must be instituted by the husband alone—1 Weir 531. *Contra*

—6 A. W. N. 42, where it was held under similar circumstances, that a prosecution for house trespass with intent to commit adultery with a woman was injudicious, in the absence of a complaint by the husband of the woman.

The complaint referred to in this section means a complaint as defined in sec. 4 (h). Information lodged by the complainant before the Police is not a complaint sufficient to warrant a conviction under secs. 497 and 498 I. P. C.—30 Cal. 910, 17 C. P. L. R. 105, 2 Weir 235; 43 M. L. J. 564. But where on a charge under sec. 366 I. P. C. the Police took up the proceeding in which the husband appeared as a witness and he asked the Magistrate to drop the proceedings thereunder but said that he intended to prosecute the accused under sec. 498 I. P. C. and to get him punished, it was held that there was a complaint, in as much as he made an allegation before the Magistrate that the offence should be inquired into—38 All. 276.

Again, the complaint referred to in this section is a complaint by the husband of the *specific offences* mentioned in this section, and not a complaint of any offence—27 Mad. 61. If the husband brings a complaint of any other offence, and from certain statements in his deposition it appears that an offence mentioned in this section has been committed, no conviction of the latter offence can be sustained, because the husband has not made a formal complaint of that offence. Thus, where the husband preferred against the accused a complaint of rape on his wife, but not of adultery, and certain statements in this deposition disclosed an offence of adultery, a conviction for the latter offence was illegal, in as much as the husband had not preferred a formal complaint of adultery, even the circumstance of the husband appearing as a witness in the case could not be regarded as amounting to the institution of a complaint for adultery—5 All. 233, 29 Cal. 415, 1883 P. R. 10. Similarly, where the accused was charged with offences under secs. 366 and 379 I. P. C. and from statements in the deposition of the husband of the woman concerned, an offence under sec. 498 was made out, a conviction for that offence was illegal, in the absence of a formal complaint by the husband—14 Bom. L. R. 141. Even the formal assent of the husband to a charge of adultery, added at the end of his deposition would not probably be a formal compliance with this section—24 W. R. 18. Where a husband charged the accused persons with theft and theft only, they could not be convicted of an offence under sec. 498 I. P. C. as there was no complaint preferred by the husband under this section in respect of the latter offence—1918 P. R. 2. (In *Ratanlal* 554, however, it was held that the word 'complaint' in this section must be taken as including not only a written complaint but also the examination of the complainant, at any rate, prior

to the issue of process. Therefore where the written complaint did not disclose an offence under sec 498 I P C but the complainant's examination made out such an offence, the Magistrate had jurisdiction to try such offence. And in 20 Cal 483, it was laid down that upon a complaint in respect of an offence under section 366 of the I P C a conviction under sec 498 may properly be had, even in the absence of the complaint by the husband, if the evidence be such as to justify the conviction for the latter offence. This decision however has not been followed in any subsequent case. It has been dissented from in 27 Mad 61, doubted in 22 Cal 1006 and distinguished in 30 Cal 910.

The foregoing remarks however do not apply where the offence of which the accused is to be convicted is not an offence under section 497 or 498 I P C but house trespass with intent to commit adultery with the complainant's wife. Thus where the complainant charged the accused with house trespass with intent to commit *theft* but it appeared that he committed house trespass with intent to commit *adultery* with the complainant's wife, he could be convicted of the latter offence, although the complainant had not made a formal complaint for that offence—23 All 82 19 Cr L J 881. But where the complainant refused to charge the accused with having entered the house with intent to commit adultery, but founded his complaint solely on the entry having been with intent to commit theft which was not true, it was held that the Magistrate was right under the circumstances in refusing to convict the accused of a charge which the husband refused to make although the Magistrate had the power so to convict him—5 M H C R App 5.

Magistrate's power to add or alter charge.—From the above it is clear that the Magistrate cannot *alter* a charge for any other offence into an offence under sec 497 or 498 I P C, see 5 All 233, 29 Cal 415 and 14 Bom L R 141 cited above. So also where a complaint was made of an offence under secs 494 and 498 I P C the Magistrate had no jurisdiction to try the accused for an offence under sec 497 I P C—Ratanlal 531, 1 A W N 112. Similarly a Magistrate cannot convict a person of an offence under sec 498 I P C when the complaint was for an offence under sec 497 I P C—12 C W N 646. A committing Magistrate cannot alter a charge of rape into one of adultery on the representation of the accused, without any request on the part of the husband of the woman—2 A W N 165.

Similarly, the Court cannot *add* a charge of an offence referred to in this section without a formal complaint in respect of the charge by the person specified. Where the accused was committed to the Sessions on charges under secs 363 and 366 I P C and at the conclusion of the evidence, to establish these charges the Sessions Court added a charge

under sec. 498 I P. C. and convicted the accused on all the three charges, it was held that the procedure adopted by the Sessions Judge was not regular, that the additional charge was prejudicial to the accused, and that the conviction under section 498 I P. C. must be set aside—31 Bom 218

Who can complain —The only person who can prefer a complaint of an offence referred to in this section is the husband of the woman. A conviction for an offence under sec. 498 I P. C. without a complaint by the husband is illegal—2 Weir 235. The husband is entitled to make the complaint even though the marriage has been dissolved before the complaint—23 Cr L J 462 (Lah.)

In the *absence* of the husband, the complaint may be made by any person having the care of the woman. Where at the time of the offence, the wife was left under the care of another, the fact that the husband stands by will not prevent the temporary guardian from preferring the complaint—17 Cr L J 363 (Mad). The absence must be from the place and therefore where the complaint was preferred by the nephew of the husband, when the latter was bed ridden with paralysis, it was held that the Court could not take cognisance of the offence—3 S L R 15. But this ruling is no longer correct in view of the words "sickness or infirmity" occurring in the proviso newly added.

If the husband be a minor, he can be represented by another in a prosecution for adultery. See the proviso. The contrary view taken in 2 Weir 235 will no longer stand as good law. But the husband can, even though he is a minor, make the complaint, and there is nothing in law to prevent him from doing so—23 Cr L J 613 (Lah.). Even the proviso newly enacted will not debar the minor husband from lodging the complaint, for the proviso is merely an enabling provision.

Death of husband—effect —The law only requires that the prosecution on a charge of adultery should be instituted by the husband. But it cannot be said that the death of the husband after institution of the prosecution but before trial necessarily puts an end to the prosecution, although it is desirable that the charge should be withdrawn by the prosecution on the death of the aggrieved party—4 M H C. R App 55.

Withdrawal of case by husband —If the complainant withdraws the charge *before commitment* to the Sessions, the Court can discharge the accused, but a withdrawal after commitment will not have such effect, because a commitment once made by a competent Magistrate can be quashed only by the High Court and only on a point of law—4 All 150. In a Bombay case, however, the order of discharge of the accused

upon withdrawal by the complainant after the case was committed to the Sessions, was held to be valid—5 B H C R 27

Acquittal for want of proper complaint—Fresh complaint —
Where the brother of the husband of the woman instituted a complaint under sec 498 I P C alleging that he had authority from the husband to prefer the complaint, but after taking evidence the Magistrate held that the complainant had no authority and acquitted the accused, and subsequently the husband himself instituted the complaint, it was held that the previous acquittal was no bar to a fresh trial—31 All 317; 17 Bom L R 678

199-A *When in any case falling under Section 198 or Section 199, the person on whose behalf the complaint is sought to be made is under the age of eighteen years or is a lunatic, and the person applying for leave has not been appointed or declared by competent authority to be the guardian of the person of the said minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, notice shall be given to such guardian, and the Court shall, before granting the application, give him a reasonable opportunity of objecting to the granting thereof*

Objection by lawful guardian to complaint by person other than person aggrieved

This section has been added by sec 53 of the Criminal Procedure Code Amendment Act, 1923

"We have added a new section 199A in order to safeguard the rights of a legally appointed guardian"—*Report of the Select Committee of 1916*

CHAPTER XVI

OF COMPLAIN-

GISTRATES

It is most desirable that Magistrates should follow the proper method of dealing with complaints.

Magistrates should also be prevented from receiving complaints before them in the high court as to what it

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200. [* * *] A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the Magistrate:

Provided as follows:—

(a) when the complaint is made in writing, nothing herein contained shall be deemed to require a Magistrate to examine the complainant before transferring the case under Section 192;

(aa) *when the complaint is made in writing, nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complaint has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties;*

(b) where the Magistrate is a Presidency Magistrate, such examination may be on oath or not as the Magistrate in each case thinks fit, and need not be reduced to writing: but the Magistrate may, if he thinks fit, before the matter of the complaint is brought before him, require it to be reduced to writing;

(c) when the case has been transferred under Section 192 and the Magistrate so transferring it has already examined the complainant, the Magistrate to whom it is so transferred shall not be bound to re-examine the complainant.

Change.—This section has been amended by section 54 of the Criminal Procedure Code Amendment Act, 1923. The words "subject to the provisions of section 476" which occurred at the very beginning of the old section have been omitted, and proviso (a a) has been newly added. "We would add to this clause a provision that in the case of a complaint under sec. 476, the examination of the complainant shall be dispensed with"—*Report of the Select Committee of 1916*

Taking cognizance.—A Magistrate is bound to take cognizance of an offence upon complaint; see notes under sec. 190. "A Magistrate is bound to receive all complaints, whether they be preferred orally or in writing"—*Cal. G. R. & C. O.* p 8.

upon withdrawal by the complainant after the case was committed to the Sessions, was held to be valid—5 B. H. C R 27

Acquittal for want of proper complaint—Fresh complaint.—Where the brother of the husband of the woman instituted a complaint under sec. 498 I. P. C alleging that he had authority from the husband to prefer the complaint, but after taking evidence the Magistrate held that the complainant had no authority and acquitted the accused, and subsequently the husband himself instituted the complaint, it was held that the previous acquittal was no bar to a fresh trial—31 All 317; 17 Bom L R. 678

199-A. *When in any case falling under Section 198 or Section 199, the person on whose behalf the complaint is sought to be made is under the age of eighteen years or is a lunatic, and the person applying for leave has not been appointed or declared by competent authority to be the guardian of the person of the said minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, notice shall be given to such guardian, and the Court shall, before granting the application, give him a reasonable opportunity of objecting to the granting thereof.*

Objection by lawful guardian to complaint by person other than person aggrieved.

This section has been added by sec 53 of the Criminal Procedure Code Amendment Act, 1923.

"We have added a new section 199A in order to safeguard the rights of a legally appointed guardian"—*Report of the Select Committee of 1916*

CHAPTER XVI.

OF COMPLAINTS TO MAGISTRATES

It is most desirable that Magistrates should follow the procedure which is quite clearly laid down in this chapter dealing with complaints to Magistrates—21 C. W. N. 127

Magistrates should also be prompt in disposing of complaints under this chapter. They have no right whatever to keep complaints instituted before them without passing order for several months. Such action is in the highest degree improper and shows want of proper understanding as to what their duties are—18 Cal. L J 371 (All)

200. [* * *] A Magistrate taking cognizance of an offence on complaint shall at once <sup>Examination of com-
plainant.</sup> examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the Magistrate:

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(aa) when the complaint is made in writing, nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complaint has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties;

(b) where the Magistrate is a Presidency Magistrate, such examination may be on oath or not as the Magistrate in each case thinks fit, and need not be reduced to writing: but the Magistrate may, if he thinks fit, before the matter of the complaint is brought before him, require it to be reduced to writing,

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Taking cognizance —A Magistrate is bound to take cognizance of an offence upon complaint, see notes under sec. 190. "A Magistrate is bound to receive all complaints, whether they be preferred orally or in writing"—*Cal. G. R. & C. O. p 8*

If a *pardanashin* lady makes a complaint to a Magistrate he is entitled to take cognisance of it, but before he takes cognisance he must be satisfied that it is her complaint. It is comparatively unimportant by what means the complaint reaches the Magistrate if it is really her complaint—42 Cal 19

Presentation of complaint —Since the complainant is to be examined "at once" it follows therefore that ordinarily a complaint must be presented in person. A complaint should never be accepted which is not signed by the complainant and is not preferred by a person duly authorised to prefer that specific complaint—42 Cal 19. The presentation of a complaint through a Mukhtar is illegal because the Magistrate cannot at once examine the complainant—Ratanlal 625

Examination of complainant —The object of requiring the Magistrate to examine the complainant possibly is that the facts constituting the offence may be ascertained when in a written complaint they are not given—25 C W N 357. The object of the examination is further to see whether there is a *prima facie* case against the accused, and to prevent the issue of processes in cases where the examination of the complainant would show that the complaint was false, frivolous and vexatious and intended merely to harass the accused—1911 P R 11. The object of the examination is to find out whether there is any matter which calls for investigation by a Criminal Court—10 A L J 79

The examination of the complainant is not to be a mere form but an intelligent inquiry into the subject matter of the complaint, carried far enough to enable the Magistrate to exercise his judgment as to whether there is or there is not sufficient ground for proceeding—Cal G R & C O p 9

At once —The law requires that the complainant shall be examined *at once*, the Court cannot fix a future date for the examination of the complainant

Examination compulsory —A Magistrate cannot refuse to take cognisance of an offence on receipt of a complaint, but he is bound to examine the complainant—13 Cal 334. Even in a case in which a charge can in the first instance be laid before the Police, the Magistrate is bound to examine the complainant if the latter chooses to make a complaint—14 W R 36. Even if a Magistrate finds a complaint to be false and groundless, he cannot refuse to examine the complainant—3 N. W P H C R 272. Although it is competent for him to dismiss the complaint, still he cannot dismiss it without examining the complainant—4 A W N 47, 3 C W N 17

When a complaint is presented by the complainant's Mukhtar, the Magistrate will dismiss the complaint because he has no opportunity

to examine the complainant as required by this section—Ratanlal 625

Mode of examination —On presentation of a complaint the Magistrate shall examine the complainant on oath, the substance of that examination must be reduced to writing, and must be distinct from the complaint itself. Mere calling upon the complainant to attest the complaint is not a sufficient compliance with this section—18 All 221. If however the complaint is made in writing and is sufficiently clear it may frequently be a sufficient compliance if the Magistrate reads it over to the complainant and the complainant is on oath asked to subscribe to it. But if the written complaint is obscure and vague, the Magistrate would be bound to examine the complainant at sufficient length for the purpose of clearly ascertaining the allegations on which the complaint is made—6 Bom L R 662

If the complainant is a *pardanashin* lady, she may be examined by *commission* under Sec 503 of this Code. The terms of that section are very wide. They refer not only to an inquiry and a trial but to any other proceeding. That section authorises the examination of any witness, and a complainant is certainly a witness—42 Cal 19. *Contra*—1896 P R 10, where it is laid down that in the preliminary stage of proceeding the complainant is not a witness but a mere complainant, and cannot be examined by commission.

Signature of complainant —If the complaint is in writing, it must be signed by the complainant, a complaint cannot be accepted where it is not signed by him—42 Cal 19, 1 P L T 561

After the complainant has been examined, and the substance of the examination has been reduced to writing by the Magistrate, such writing shall be signed by the complainant. Unless it is signed, the Magistrate cannot take cognizance of the complaint—3 B L R 67. Such is the vitiating effect of want of signature that a conviction in the alternative charges of making two statements, one in the examination under this section of the accused as a complainant, and the other in his examination subsequently as a witness, both the statements contradicting each other, is bad, if the statement recorded under this section does not bear the signature of the complainant—6 C W N 840

Omission to examine—Effect —The examination of the complainant is not a mere matter of formality, and when a Magistrate dismisses a complaint without making such examination himself the omission is a material one and cannot be cured by sec 537 of the Code—1 P L T 346, 43 M L J 710, 15 S L R 200, U B R. (1910) 1st Qr 73. The cognizance of an offence by a Magistrate on complaint is not complete until the complainant has been examined

on oath—1 P. L. T. 346 .A Magistrate cannot dismiss a complaint without examining the complainant—30 Cal 923 ; 2 P. L. T. 142 ; 23 C. W. N 392 ; 9 C W. N 199 ; 3 C W N 17 , 4 A W N 47 ; 8 W. R 12 No investigation can be ordered under Sec 202 without examining the complainant—20 Cr. L J 552 (Patna), 1 P. L T 564 (This is now expressly provided in clause (a) of sec 202) No process can be issued against the accused unless and until the Magistrate has examined the complainant—42 Cal 19

Contra—1 P L. J 592 ; 1 P. L T 349 ; 1 P L T 446 and 46 Cal 807, where it is held that the omission to examine the complainant on oath before issuing process is a mere irregularity and does not invalidate the conviction, in the absence of any prejudice to the accused by reason of such irregularity In an Allahabad case also, it has been held that the failure to examine the complainant is a mere irregularity, not vitiating the entire proceedings. Thus, where the complainants made a complaint to the Police that the accused beat them causing grievous hurt, but the police did not send up the case and the complainants applied to the Magistrate, who sent for the police papers and summoned the accused without examining the complainants, it was held that the irregularity did not vitiate the proceedings—37 All 628.

Complaint by Court or public servant —Under the new prov^o (aa) when a complaint is preferred by a Court or public servant, the examination of the complainant may be dispensed with Even before this amendment, it was held in several cases that the omission to examine the Court or the public servant did not vitiate the proceedings Thus, where the complainant, who was a barliff and who was resisted by the accused in the execution of a civil process, was not examined but his report was brought on the record through the Nazir, it was held that the fact of the complainant not being examined would not justify the setting aside of the conviction, because there were other witnesses who gave a full account of the matter—8 S L. R. 41. Where the complaint in writing and signed was preferred by a responsible public official and was accompanied with a sanction of the Local Government for the prosecution of one of its servants, it was held that the failure by the Magistrate to examine the complainant on oath had not in any way prejudiced the accused or caused a failure or miscarriage of justice—1911 P R 11 Where the District Judge made a complaint to the District Magistrate by means of a letter, and the Magistrate ordered a police investigation without examining the District Judge on oath in support of his statement in his letter, it was held that the omission to examine was a mere irregularity curable by sec 537 (a)—20 Bom. L. R. 1018

201 (1) If the complaint has been made in writing to a Magistrate who is not competent to take cognizance of the case, he shall return the complaint for presentation to the proper Court with an endorsement to that effect.

Procedure by Magistrate not competent to take cognizance of the case

(2) If the complaint has not been made in writing, such Magistrate shall direct the complainant to the proper Court.

202 (1) If the Chief Presidency Magistrate, or any other

Postponement of issue of process

Presidency Magistrate whom the Local Government may from time to time authorize on this behalf, or any Magistrate of the first or second class, is not satisfied as to the truth of a complaint of an offence of which he is authorized to take cognizance, he may, when the complainant has been examined, record his reasons, and may then postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or direct a previous local investigation to be made by any officer subordinate to such Magistrate, or by a police officer, or by such other person, not being a Magistrate or police-officer, as he thinks fit, for

202 (1) Any Magistrate, on receipt of a complaint of an offence of which

Postponement of issue of process

he is authorised to take cognizance or which has been transferred to him under Section 192, may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or, if he is a Magistrate other than a Magistrate of third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint.

Provided that no such direction shall be made—

(a) unless the complainant has been examined on oath

on oath—1 P L T 346 A Magistrate cannot dismiss a complaint without examining the complainant—30 Cal 923 2 P L T 142 23 C W N 392, 9 C W N 199, 3 C W N 17, 4 A W N 47, 8 W R 12 No investigation can be ordered under Sec 202 without examining the complainant—20 Cr L J 552 (Patna), 1 P L T 564 (This is now expressly provided in clause (a) of sec 202) No process can be issued against the accused unless and until the Magistrate has examined the complainant—42 Cal 19

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Presidency Magistrate whom the Local Government may from time to time authorize on this behalf, or any Magistrate of the first or second class, is not satisfied as to the truth of a complaint of an offence of which he is authorized to take cognizance, he may, when the complainant has been examined, record his reasons, and may then postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or direct a previous local investigation to be made by any officer subordinate to such Magistrate, or by a police officer, or by such other person, not being a Magistrate or police-officer, as he thinks fit, for

202 (1) *Any Magistrate, on receipt of a complaint of an offence of which*

Postponement of issue of process

he is authorised to take cognizance or which has been transferred to him under Section 192, may if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or, if he is a Magistrate other than a Magistrate of third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint

Provided that no such direction shall be made—

(a) unless the complainant has been examined on oath

the purpose of ascertaining the truth or falsehood of the complaint.

under the provisions of Section 200, or

(b) where the complaint has been made by a Court under the provisions of this Code.

(2) If such investigation is made by some person not being a Magistrate or a police-officer, he shall exercise all the powers conferred by this Code on an officer in charge of a police-station, except that he shall not have power to arrest without warrant.

(2) If any inquiry or investigation under this section is made by a person not being a Magistrate or a police-officer, such person shall exercise all the powers conferred by this Code on an officer in charge of a police-station, except that he shall not have power to arrest without warrant.

(2A) Any Magistrate inquiring into a case under this section, may, if he thinks fit, take evidence of witnesses on oath.

(3) This section applies also to the police in the towns of Calcutta and Bombay.

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Change — This section has been amended by sec 55 of the Criminal Procedure Code Amendment Act, 1923

The main changes introduced are the following —

"(1) Third class Magistrates have been given power to make preliminary inquiries personally (2) Authority to make a preliminary inquiry has been given in any case in which the Magistrate thinks fit, for reasons to be recorded in writing. The only ground contemplated by the old section was 'if the Magistrate is not satisfied as to the truth of the complaint.' This is thought to be undesirably narrow (3) The words 'inquiry or investigation' have been substituted for the expression 'previous local investigation,' and power is given to take evidence upon oath in the case of such a preliminary inquiry. (4) Presidency Magis-

contemplate the subordination of a 1st class Magistrate to a District Magistrate. Both are first class Magistrates, and the latter cannot direct the investigation to be held by the former—1912 P R 2. A Deputy Magistrate attached to the sub division is subordinate to the Sub Divisional officer—19 Cr L J 126 (Pat)

The investigation may be made by any officer subordinate to the Magistrate even though he be a *clerk*—36 Cal 72

Investigation by Police—A local investigation can be made by a police officer but if the complaint is made against a police officer, it is improper for the Magistrate to call for report from the police officer who is himself the accused person—14 Cal 141, or from some other police officer—4 A W N 47, 18 A L J 620, or even from a superior police officer or the Superintendent of Police—9 C W N 129, 18 A L J 731. In such cases the inquiry had better be held by the Magistrate himself—20 Mad 387, 18 A L J 731, 18 A L J 620, 22 O C 321, 21 Cr L J 343 (All)

Besides, it is not a proper course to make indiscriminate use of police agency for investigating complaints. The object of law is to give persons who have been injured an access to justice independent of Police, and it is improper for the Magistrate, when a complaint is made to him, to refer the complaint to a Police officer—12 Bom 161. In petty cases of assault and the like, the Police ought not to be directed to make inquiries, because in petty matters the Police are under a strong temptation of making money out of the complaint. In such matters the proper course for the Magistrate is to take action at once upon the complaint—1894 P R 19

Magistrates are cautioned against the indiscriminate use of police agency for the purpose of ascertaining matters as to which a Magistrate is bound to form his own opinion upon evidence given in his presence. This caution is specially needful in respect of all cases regarding offences not cognizable by the Police—*Cal G R & C O* p 9

District Magistrates power to order investigation—A District Magistrate cannot make a direction to a subordinate Magistrate before whom a case was pending, to the effect that that officer should send in a report to him after making a full investigation into the allegations made; the District Magistrate ought to have withdrawn the case from the file of the subordinate Magistrate in case he thought that that officer was not proceeding properly—15 A L J 642

Proviso (a)—Examination of complainant—Before directing a local investigation, the complainant must be examined either by the Magistrate who receives the complaint or by some other Magistrate to whom the case might have been transferred—Ratanlal 368. Unless the complainant

is duly examined, an inquiry and report under this section cannot be called for, and, if made, are without jurisdiction and cannot form the basis of any further action; and the complainant who was not examined cannot be prosecuted in respect of his complaint (if it is false) which was dismissed on a report called for under this section—1912 P. R. 2; 27 Cal. 921; 4 O. C. 127.

Where after the complainant was examined by the Magistrate who took cognizance of the case, a superior Magistrate transferred the case to his own file and without re-examining the complainant, and without recording any reasons, referred it to the police for inquiry and report, it was held that the procedure was illegal, and the fact that the complainant was previously examined by the Magistrate who took cognizance was of no avail—2 Weir 241.

Powers of the investigating officer—A Magistrate conducting a local investigation can exercise all the powers of a Magistrate including the power to *administer oath* (see the new subsection 2A). Such proceeding is a judicial proceeding within the meaning of Sec. 476—1 Cr. L. J. 118 (Mad), and the investigating Magistrate can direct the prosecution of the complainant under sec. 476—36 Cal. 72.

Contra—21 M. L. J. 795, where it was held that a preliminary investigation made by a Magistrate under this section was not a judicial proceeding and therefore a person could not be prosecuted for an offence brought to the notice of the Court during such investigation. This ruling is no longer correct.

The Magistrate holding the investigation is not disqualified thereby from trying the case, when there is nothing to indicate that he initiated or directed the proceedings or took any personal interest in the matter of the complaint presented before him—24 Cal. 167. The fact that the investigating Magistrate expressed an opinion in submitting the report is no bar to his holding the trial—4 C. W. N. 604. But where a Magistrate took an active part in forwarding the police inquiries and collecting evidence against the accused he is disqualified from trying the accused—23 Cal. 328.

The officer who conducts the investigation cannot himself decide upon the truth or falsity of the complaint—U. B. R. (1910) 1st Qr. 73. He can only submit a report. But it is within his power to weigh the evidence and discredit the same, if necessary—1922 M. W. N. 326.

Position of the accused—A person complained against does not become an accused person until it has been decided to issue process against him, under Chapter XVII Sec. 340, therefore does not entitle a person complained against to be represented by a pleader during the preliminary inquiry which may be held under this section—4 N. L. R. 81;

38 Cal 880, or during the proceeding when the Magistrate is considering the report of the local investigation ordered by him—21 C. W. N. 127 If he chooses to attend the proceedings he may do so like any other member of the public, but he has no *locus standi* as a party, the purpose of the law being clearly to exclude him until sufficient ground for joining him has been made out by the complainant Therefore the Magistrate can refuse him permission to cross examine the complainant's witnesses—4 N. L. R. 81. A preliminary inquiry should not be held in the presence of the person complained against, and he should not be allowed to cross examine the complainant's witnesses—40 Cal 444, 4 P. L. W. 307 Statements made by the person complained against during an inquiry under this section cannot be regarded as having been recorded under Sec 164 or Sec 364 Such person does not stand in the position of an accused person during the inquiry, and such statement cannot be admitted in evidence against him—32 Cal. 1085

Evidence in the inquiry —The Magistrate conducting the preliminary inquiry need not confine himself to the evidence of the complainant alone, but he may examine such witnesses as he thinks fit—Ratanlal 669 There is nothing in section 202 to prevent the investigating officer from making a full inquiry by obtaining information from the complainant and his witnesses, and the defendant and his witnesses, if any—33 Cal 1282

Submission of report :—The officer who conducted the investigation must submit the report of his investigation to the same Magistrate who had originally ordered him to investigate, and he is not authorised to submit it to another Magistrate for the purpose of dismissing the complaint and declaring that no offence had in reality been committed—1918 P. W. R. 10

Revision —If an irregularity in procedure has not resulted in miscarriage of justice, the High Court will not make an order which can result only in harassment and waste of public time In a case in which a perfunctory inquiry has been made by the Police and the report considered in a perfunctory manner by the Magistrate, the High Court will interfere and insist on the provisions of this section being strictly enforced. But where the inquiry has been carefully made and carefully considered, the High Court will refuse to re-open the matter—4 P. L. W. 114.

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transferred, may dismiss the complaint, if, after examining the complainant, and considering the result of the investigation (if any) made under Section 202, there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing.

transferred, may dismiss the complaint, if *after considering the statement on oath (if any) of the complainant and the result of any investigation or inquiry under Section 202*, there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing.

This section has been amended by Sec 56 of the Criminal Procedure Code Amendment Act, 1923. The amendment is merely verbal.

Dismissal when can be made—This section gives very large powers to the Magistrate to dismiss a complaint without issuing a process against the accused persons, but certain conditions are laid down in the chapter in which the section occurs, and those conditions must be strictly fulfilled in making an order under this section. A Magistrate may dismiss a complaint (1) if he upon the statement of the complainant reduced to writing under sec 200 finds that no offence has been committed, (2) if he distrusts the statements made by the complainant, (3) if he distrusts that statement, but his distrust not being strong enough to warrant him to act upon it he directs further inquiry as provided by sec 202 and after considering the result of the investigation he finds there is no sufficient ground for proceeding—14 Cal 141 13 Bom 690.

There can be no dismissal of complaint, after process has issued. This section refers to cases falling within Chapter XVI where there has been no issue of process. Where the accused has been summoned to answer a charge there is a proceeding within the meaning of Chapter XVII and the complaint cannot be dismissed under sec 203—Ratanlal 544. Even an order directing withdrawal of process issued against the accused will not amount to an order of dismissal of complaint—12 C W N 68.

Who can dismiss complaint—The complaint can be dismissed either by the Magistrate who took cognizance of it, or by the Magistrate to whom it was transferred for local investigation. The District Magistrate has no power to pass any order for dismissal of process, unless he first removes the case to his own file—6 C W N 843. When a case has been transferred to a subordinate Magistrate and is pending in his file, the District Magistrate has no power to pass an order of dismissal of complaint—3 C W N 490. Unless he withdraws the case to his

own file, the District Magistrate cannot pass any orders in the case, and the only person who can deal with the case is the subordinate Magistrate—12 W R 53

Duty of Magistrate before dismissal—Before a Magistrate can dismiss a complaint, he must, according to the words of this section, examine the complainant and consider the result of the investigation (if any) made under sec 202. In other words, a Magistrate cannot dismiss a complaint without complying with the provisions of law as laid down in sections 200 and 202. Where there was no previous local investigation ordered under sec 202 nor any examination of the complainant as directed by sec 200, the Magistrate had no jurisdiction to dismiss the complaint under this section—30 Cal 923

But before an order of dismissal is passed on the complaint, the Magistrate must give the complainant an opportunity to prove his case—16 C. W. N 143, Ratanlal 365. It is improper for a Magistrate to dismiss a complaint while sitting in his private room, and without giving the complainant or his pleader an opportunity of being heard—10 C. W. N 1086

Examination of complainant—Before dismissing the complaint, the Magistrate is bound to examine the complainant. Until he has at least examined the complainant, he is not in a position to exercise the discretionary power to issue process or to dismiss the complaint—4 M. H. C. R. 162, 13 Bom 590

When a deposition in the shape of a complaint is made orally or in writing and is sworn to, the requirements of this section as regards examination of complainant are fulfilled—9 All 666, 4 Bom L. R. 609. But merely cross examining the complainant on the deposit on of the complaint recorded in the preliminary inquiry held under sec 159 is not a sufficient compliance with the requirements of this section—30 Cal 923.

Where a Magistrate examined the complainant and only one of his witnesses, and without examining the rest of the witnesses dismissed the complaint, it was held that the entire evidence for the prosecution should have been received by the Magistrate unless for some very strong reasons he considered the evidence unnecessary—11 A. L. J 451

In case of complaint of a serious offence like murder, the dismissal of the case without any judicial examination of the complainant or his witnesses is extremely illegal—23 C. W. N 392

There is nothing in this section to show that the Magistrate must *de cede* consider the complaint, and may not take time to consider the complaint petition and the examination on oath—19 Cr. L. J 228 (Patna).

"Any inquiry or investigation —This section empowers a Magistrate to dismiss the complaint without any investigation under Sec 202, if after examining the complainant he considers there is no sufficient ground for proceeding—19 Cr L J 228 (Patna)

Where an investigation has been ordered under Sec 202, the Magistrate is not bound, after receipt of the report of such investigation, to examine any witnesses or hold any inquiry before he dismisses the complaint. It is sufficient that he takes into consideration the result of the investigation arrived at by the subordinate officer—19 Cr L J 126 (Patna)

Grounds of dismissal —A complaint can be dismissed if the Magistrate thinks that there is not a sufficient ground for proceeding. The expression 'sufficient ground' in this section points exclusively to the facts which the complainant brings to the knowledge of the Magistrate and to their establishing a *prima facie* case against the accused. In exercising his discretionary power of summary dismissal of complaint, the Magistrate should not allow himself to be influenced by considerations altogether apart from the facts adduced by the complainant in support of the charge, nor by a consideration of the motive by which the complainant is actuated. What he has to consider is whether there is a *prima facie* evidence of a criminal offence which in his judgment calls upon the alleged offender to answer—13 Bom 590. The decision whether there is sufficient ground must be reached by the exercise of discretion based upon judicial considerations. That the Magistrate considered the probable result of the proceeding undesirable or the motives and conduct of the complainant discreditable, are not relevant considerations—38 Mad 512. In the absence of any finding that the complaint was false or unsustainable on the evidence likely to be available, the passing of an order of dismissal under this section constitutes an irregularity with which the High Court can interfere in revision—38 Mad 512.

The reasons for dismissing a complaint should be based on inference of facts arising from or disclosed by (1) the complaint, (2) the examination of the complaint, and (3) the investigation if any, made under Sec 202. This provides a wide field. Anything outside it is extra judicial and must be discarded—9 Bom L R 742.

The Magistrate entitled to dismiss a complaint under this section ought to exercise some discretion with reference to the particular circumstances of the case. If the dismissal of the complaint is not the result of judicial discretion it will be set aside—1 C W. N 57, 24 W. R 64.

What are not proper grounds of dismissal —A Magistrate should not dismiss a complaint because the case is one in which a civil remedy is obtainable, if the allegations contained in the complaint disclose

a criminal offence—to W. R. 40. A complaint cannot be dismissed on the ground that the entertainment of the complaint would encourage hundreds of such complaints and should stir up old religious feelings of animosity between the Hindus and Mussalmans—Ratanlal 562; or on the ground that a more responsible person ought to have preferred the complaint—18 W. R. 55; or on the ground that the complainant is a man of low caste, and the alleged offence is theft of a goat which is merely a harm under Sec. 95 I. P. C. rather than an offence—2 W. R. 35; or on the ground that the complainant is actuated by a malicious feeling and that the alleged offence was committed six years ago, and that if the act of the accused was held criminal, a large part of the population would go to jail—Ratanlal 549; or on the ground that the complainant had no personal knowledge of the facts alleged in the complaint—Ratanlal 669, or on the ground that the person complained against has been exonerated in a previous departmental inquiry into the facts alleged in the complaint—1887 P. R. 33, or on the ground that the evidence discloses an offence other than, or in addition to, that complained of—8 W. R. 32.

Recording reasons —The Magistrate is bound to record his reasons for dismissing the complaint, for if that is not done, it would be impossible for the High Court to consider whether the discretion vested in the Magistrate under this section has been properly exercised or not—14 Cal. 141, 2 P. L. T. 142. An order of a Magistrate dismissing a complaint under this section without recording any reasons for dismissal but merely stating that he agrees with the police report is improper and will be set aside—21 M. L. J. 492.

The words in this section are "he *shall* record", therefore failure to record reasons is a direct disobedience of law and not a mere irregularity—40 Cal. 41. *Contra*—5 M. L. T. 79, where it was held to be a mere irregularity, but in this case, the omission was supplied by a statement under Sec. 441.

Effect of dismissal:—A dismissal of a complaint after hearing the complainant and after considering the result of an investigation ordered under sec. 202 amounts to a legal determination of complaint, and the complainant can be prosecuted for making a false charge under sec. 211 I. P. C.—6 C. W. N. 295. Until a complaint is dismissed under this section or is otherwise disposed of, no proceedings can be taken under sec. 211 I. P. C. against the complainant—3 C. W. N. 758 followed in 4 C. L. J. 48.

When a complaint has been dismissed under this section without issue of process to the accused, no compensation to the accused can be awarded—1897 P. R. 14; 1906 P. R. 3. It can be awarded only when

the accused being summoned to attend Court is discharged or acquitted, and the complaint is found to be frivolous or vexatious—1906 P. R. 3.

So also, no suit for malicious prosecution will lie against the complainant, when the complaint is dismissed under this section—25 M. L. J. 1.

Power to rehear complaint —A dismissal under this section is a dismissal without a trial; it is therefore open to a Magistrate to rehear a complaint which he has dismissed under sec. 203 or to rehear a fresh complaint, though the order has not been set aside by a higher Court—29 Mad 126 (F B), 16 Cr L J. 814 (Mad); 28 Cal. 211, 9 All. 85; 36 Cal. 415; 1 N. L. R. 18, 36 All. 53, 5 A. L. J. 137; 29 All. 7; 21 Cr. L. J. 379 (All). 1902 P. R. 9, 1911 P. R. 10 (overruling 1894 P. R. 33) *Contra*—24 W. R. 75, 24 Cal. 286, 23 Cal. 983, 18 Mad. 255, where a fresh complaint was held to be barred.

In 21 A. L. J. 215, it has been held that the Magistrate cannot reopen the same case, but there is no bar to the entertainment of a second complaint on the same facts.

When a Magistrate has dismissed a complaint, his *successor* or any other Magistrate can entertain a fresh complaint on the same facts—36 All. 129; 2 P. L. J. 34; 1 P. L. T. 29. But in 22 All. 106, it is held that a Magistrate of co ordinate authority cannot entertain a fresh complaint on the same facts or reopen the old complaint as if it were an appeal or matter of revision. In 2 C. W. N. 290, it is laid down that a complaint once dismissed by a Magistrate cannot be revived by his successor in office.

Further inquiry —Where a complaint has been dismissed under this section, the Sessions Judge may direct further inquiry. See Sec. 436. Where a further inquiry having been ordered under sec. 436, the Magistrate after taking some evidence again dismissed the complaint under sec. 203, and the Sessions Judge, being moved, held that the Magistrate could not dismiss the complaint under sec. 203 for the second time but was bound to issue process against the accused, *held* that the Sessions Judge's view was wrong and the second order of dismissal was perfectly legal—25 C. W. N. 312.

Death of complainant —Effect —As there is no abatement of a criminal case on the death of the complainant, a fresh complaint on the same facts will not lie but the old complaint must be treated as pending and proceeded with to its disposal—16 Cr. L. J. 713 (Mad).

Revision —Where a complaint was dismissed by the Magistrate under this section, the complainant could apply for revision direct to the High Court, instead of to the Sessions Court—2 L. W. 1126.

The High Court can interfere with an order of discharge made by Presidency Magistrates, not by virtue of the powers conferred by Sec.

a criminal offence—10 W R 40 A complaint cannot be dismissed on the ground that the entertainment of the complaint would encourage hundreds of such complaints and should stir up old religious feelings of animosity between the Hindus and Mussalmans—Ratanlal 562, or on the ground that a more responsible person ought to have preferred the complaint—18 W R 55, or on the ground that the complainant is a man of low caste, and the alleged offence is theft of a goat which is merely a harm under Sec 95 I P C rather than an offence—2 W R. 35, or on the ground that the complainant is actuated by a malicious feeling and that the alleged offence was committed six years ago, and that if the act of the accused was held criminal, a large part of the population would go to jail—Ratanlal 549, or on the ground that the complainant had no personal knowledge of the facts alleged in the complaint—Ratanlal 669, or on the ground that the person complained against has been exonerated in a previous departmental inquiry into the facts alleged in the complaint—1887 P R 33, or on the ground that the evidence discloses an offence other than, or in addition to, that complained of—8 W R 32

Recording reasons —The Magistrate is bound to record his reasons for dismissing the complaint, for if that is not done, it would be impossible for the High Court to consider whether the discretion vested in the Magistrate under this section has been properly exercised or not—14 Cal 141, 3 P L T 142 An order of a Magistrate dismissing a complaint under this section without recording any reasons for dismissal but merely stating that he agrees with the police report is improper and will be set aside—21 M L J 492

The words in this section are "*he shall record*" therefore failure to record reasons is a direct disobedience of law and not a mere irregularity—40 Cal 41 *Contra*—5 M L T 79, where it was held to be a mere irregularity, but in this case, the omission was supplied by a statement under Sec 441

Effect of dismissal —A dismissal of a complaint after hearing the complainant and after considering the result of an investigation ordered under sec 202 amounts to a legal determination of complaint, and the complainant can be prosecuted for making a false charge under sec 211

P. C—6 C W N 295 Until a complaint is dismissed under this section or is otherwise disposed of, no proceedings can be taken under sec 211 I P C against the complainant—3 C W N 758 followed in 4 M L J 88

When a complaint has been dismissed under this section without issue of process to the accused, no compensation to the accused can be awarded—1897 P. R 14, 1906 P R 3 It can be awarded only when

the accused being summoned to attend Court is discharged or acquitted, and the complaint is found to be frivolous or vexatious—1906 P R 3

So also, no suit for malicious prosecution will lie against the complainant, when the complaint is dismissed under this section—25 M L J. r

Power to rehear complaint —A dismissal under this section is a dismissal without a trial, it is therefore open to a Magistrate to rehear a complaint which he has dismissed under sec 203 or to rehear a fresh complaint, though the order has not been set aside by a higher Court—29 Mad 126 (F B), 16 Cr L J 814 (Mad), 28 Cal 211, 9 All 85, 36 Cal 415, 1 N L R 18, 36 All 53, 5 A L J 137, 29 All 7, 21 Cr L J 379 (All), 1902 P R 9, 1911 P R 10 (overruling 1894 P R. 33) *Contra*—24 W R 75, 24 Cal 286, 23 Cal 983, 18 Mad 255, where a fresh complaint was held to be barred

In 21 A L J 215 it has been held that the Magistrate cannot reopen the same case, but there is no bar to the entertainment of a second complaint on the same facts

When a Magistrate has dismissed a complaint, his *successor* or any other Magistrate can entertain a fresh complaint on the same facts—36 All 129, 2 P L J 34, 1 P L T 29. But in 22 All 106, it is held that a Magistrate of co ordinate authority cannot entertain a fresh complaint on the same facts or reopen the old complaint as if it were an appeal or matter of revision. In 2 C W N 290 it is laid down that a complaint once dismissed by a Magistrate cannot be revived by his successor in office

Further inquiry —Where a complaint has been dismissed under this section, the Sessions Judge may direct further inquiry. See Sec 436. Where a further inquiry having been ordered under sec 436, the Magistrate after taking some evidence again dismissed the complaint under sec 203, and the Sessions Judge, being moved held that the Magistrate could not dismiss the complaint under sec 203 for the second time but was bound to issue process against the accused, *held* that the Sessions judge's view was wrong and the second order of dismissal was perfectly legal—25 C W N 312

Death of complainant —Effect —As there is no abatement of a criminal case on the death of the complainant, a fresh complaint on the same facts will not lie but the old complaint must be treated as pending and proceeded with to its disposal—16 Cr L J 713 (Mad)

Revision —Where a complaint was dismissed by the Magistrate under this section the complainant could apply for revision direct to the High Court, instead of to the Sessions Court—2 L W 1126

The High Court can interfere with an order of discharge made by Presidency Magistrates not by virtue of the powers conferred by Sec.

439 but by its power under sec. 15 of the Charter Act—27 Cal. 126; 6 C. L. J. 705; 33 Cal 1282 In 36 Cal. 994, however, it is held that the High Court can exercise such power under this Code

The High Court cannot interfere on the ground of any error of law, but only on ground affecting jurisdiction: *i.e.* where the subordinate Court refused or failed to exercise jurisdiction or erred in the exercise of jurisdiction—36 Cal 994.

CHAPTER XVII.

OF THE COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES.

204. (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be one in which, according to the fourth column of the second schedule, a summons should issue in the first instance, he shall issue his summons for the attendance of the accused. If the case appears to be one in which, according to that column a warrant should issue in the first instance, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has not jurisdiction himself) some other Magistrate having jurisdiction.

Issue of process.

(2) Nothing in this section shall be deemed to affect the provisions of Section 90

(3) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid, and if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

Magistrate taking cognisance —Where a Joint Magistrate who took cognisance of a case made over the case to a Deputy Magistrate for disposal, the former ceased to have any control over the case. The case having been transferred to the Deputy Magistrate, that officer alone has

Jurisdiction to deal with an application for summons, until the case is withdrawn from his cognisance. Therefore if he refuses to issue process as unnecessary, the Joint Magistrate has no jurisdiction to order for its issue—32 Cal 783, 10 C W N 1086

Offence —Process can issue only for an offence already committed. It is not competent for the Magistrate to issue process in anticipation of an offence. Such a case is for the interference of the Police and not of the Magistrate—Ratanlal 90

A neglect to maintain a wife is not an *offence*, therefore an application for maintenance under sec 488 should not be dismissed under sub section (3) of this section owing to applicant's failure to comply with an order for the payment of process fees—16 Mad 234

Sufficient ground —The only condition requisite for the issue of process is that the complainant's deposition must show some sufficient ground for proceeding—1864 W R 33. Unless the Magistrate is satisfied that there is sufficient ground for proceeding with the complaint, or sufficient material to justify the issue of process (18 Cr L J 626, Cal) he should not issue process. Where the complainant who instituted the prosecution had no personal knowledge of the allegations made in the complaint the Magistrate should satisfy himself upon proper materials that a case has been made out for the issue of process—10 C W N 1090, 11 C W N 170

In exercising the discretion under this section as to whether a process should issue the Magistrate must be guided by his own independent judgment and not by the judgment of others & give an expression of opinion by the Police—4 M H C R 162

Issue of process —Proceedings are said to commence under this chapter when processes are issued against the accused after the issue of process, a complaint cannot be dismissed under sec 203—Ratanlal 544. See notes under sec 203

If the Magistrate issues a warrant in a case in which he ought to have issued a summons the error of the Magistrate is not a ground for questioning the proceedings—1 W R 16. Under such circumstances the Magistrate can cancel the warrant and issue summons instead—1 S L R 69, 7 S L R 40

When unnecessary —Process is unnecessary when the accused voluntarily appears to answer the charge against him—Ratanlal 8. Where the complainant has taken process against some of the accused the others are entitled to appear and insist that the complaint against them shall be proceeded with or dismissed—6 Bom 50

Refusal to issue process —When the Police report is true and the Magistrate has directed the case to be entered as such, he cannot refuse

to issue process simply because there is no chance of conviction and no useful purpose would be served by an inquiry, the complainant is entitled to a process against the accused and for the attendance of his witnesses—29 Cal 410 In an inquiry before the Magistrate in a Sessions case, if the evidence for the prosecution discloses a *prima facie* case against the accused and the evidence stands un rebutted, the Magistrate cannot discharge the accused, simply because the evidence appears to be improbable In doing so the Magistrate is really trying the case instead of merely considering whether there are sufficient grounds for commitment—24 A W N 5

So also when from the examination of the complainant, it appears that there is reason for the issue of process against *all* the accused, the Magistrate exercises a wrong direction in issuing process against *some* of the accused and in refusing to issue process against the others He must issue process against all—4 C W N 560

But where two counter complainants preferred complaints before a Magistrate, and he issued process in one case and postponed the issue of process in the counter case until after the disposal of the first case, *held* that the action of the Magistrate was not illegal—3 P L T 764

Sub seo (3)—Dismissal of complaint —An application for maintenance cannot be dismissed for default to pay process fees See 16 Mad 234 cited above

Adjournment of case —If the case is adjourned the witness should be told to appear on the adjourned date, and the party should not be required to repeatedly summon his witnesses on payment of fresh process fees A dismissal of complaint on failure to pay such fees, in such a case, is not proper—1912 P W R 3

205 (1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader

Magistrate may dispense with personal attendance of accused

(2) But the Magistrate inquiring into or trying the case, may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in manner hereinbefore provided

Scope of section —Although the section speaks of issue of summons, it is not confined to summons cases only If in a warrant case, the Magistrate issues a summons instead of warrant to a *Pardanashin* lady, he can dispense with her personal attendance—21 Cal 558, 1908 P. W R 20.

Again, the section applies only where a *summons* has been issued to the accused, if however, a *warrant* is issued against him, his personal attendance cannot be dispensed with, unless he is too ill to attend the Court—13 C W N cl. 1917 P R 36

As to whether a person proceeded against under chapter VIII can be permitted to appear by pleader, see 25 All 375 and other cases cited under sec 117 at page 174 *ante*

Pardanashin lady —A *pardanashin* lady cannot as of right claim exemption from personal attendance in Court and the Magistrate cannot dispense with her appearance simply because she is a *pardanashin* lady—5 All 92 But in a summons case the Magistrate should use his discretion under this section by dispensing with her personal attendance and allowing her to appear by a pleader until he has before him clear, direct and *fruits facie* proof of an offence committed by her—6 All 59, 1908 P W R 20 1909 P W R 5 7 S L R 161 7 S L R 40 In a Sessions case she may be permitted to appear by a pleader before the committing Magistrate as well as before the Sessions Court but she will have to appear before that Court to hear the sentence in case of conviction—17 C W N 1248, 45 Mad 359

Appearance by pleader —On service of summons the accused need not personally attend but may appear by a pleader Such appearance is a valid appearance, and the Magistrate cannot prosecute the accused under section 174 I P C for non appearance (disobedience to summons)—27 Cal 98, nor can the Magistrate proceed *ex parte* and decide the case—24 W R 25 If, however, the Magistrate requires personal attendance he should direct such appearance on a fixed date, and in default, may issue a warrant—27 Cal 985

The pleader appearing for the accused may perform all acts which devolve upon the accused in the course of the trial thus, he can answer the questions put to him by the Court in his examination under sec 342, he can plead or refuse to plead to a charge under sec 255—6 S L R 206

Appearance by other persons —Where the accused was represented by her mother in law and the Magistrate proceeded with the case and convicted the accused the conviction was set aside by the High Court, as there was no proper representation of the accused in the case—Ratanlal 205, but where in an extremely trivial case the accused was represented by her father in law and convicted the High Court refused to interfere—Ratanlal 206

Recognizance bond —Where the personal attendance of the accused is dispensed with, a recognizance bond, if deemed necessary, should be taken from him, and not from his agent, binding the accused to appear personally or by agent But the Magistrate has no authority

to secure the attendance of an agent by such a bond. If the agent neglects to attend, the bond will be forfeited and the accused will pay the penalty—5 B H C R 64 .

CHAPTER XVIII.

OF INQUIRY INTO CASES TRIABLE BY THE COURT OF SESSION OR HIGH COURT.

Object of preliminary inquiry —The object of the law in requiring an enquiry before a trial in the Court of Session is to prevent the commitment of cases in which there is no reasonable ground for conviction. This provision of law, while it saves accused persons from detention in custody and prolonged anxiety of undergoing trials of offences not brought home to them, also saves the time of the Court of Session from being wasted over cases in which the charge is obviously not supported by such evidence as would support a conviction—5 All 161. A preliminary inquiry also affords the accused an opportunity of becoming acquainted with the circumstances of the offences imputed to him and enables him to make his defence—3 Mad 351.

No accused can be committed to the Sessions without a preliminary inquiry under this chapter—17 Bom L R 910

206 (1) [* * * * *] Any Presidency Magistrate, District Magistrate, Sub-divisional Magistrate, or Magistrate of the first class, or any Magistrate (*not being a Magistrate of the third class*) empowered in this behalf by the Local Government, may commit any person for trial to the Court of Session or High Court for any offence triable by such Court

(2) But, save as herein otherwise provided, no person triable by the Court of Session shall be committed for trial to the High Court.

Change —The words "Subject to the provision of sec 443" occurring in the old section at the very beginning have been omitted by the Criminal Law Amendment Act (XII of 1923).

The italicised words have been added by sec 57 of the Criminal Procedure Code Amendment Act (XVIII of 1923) "This amendment is on the same lines as that of section 144 (1) We do not think that the powers under this section should be granted to a Magistrate of the third class"—*Report of the Select Committee of 1916.*

Empowered —As to the effect of committal by Magistrates not empowered, see sec 532

For the purposes of commitment, a Joint Magistrate, if duly empowered has equal powers with the District Magistrate, and the Joint Magistrate is not bound to act upon the instructions of the District Magistrate regarding a judicial proceeding such as the commencement of a preliminary inquiry or the desirability of the committal—8 W R 61

Committal by Magistrate without jurisdiction —When the committing Magistrate has authority to commit but has no territorial jurisdiction in the place where the offence is committed, the irregularity will be cured by sec 531 unless it has occasioned a failure of justice—26 Mad 640, 17 Mad 402 In 11 C L R 55 and Ratanlal 922 such a committal was held to be void

Committal to wrong sessions —See notes under sec 177

‘Offence triable by such Court —The procedure to be adopted under this chapter is not confined to cases exclusively triable by the Court of Session, but is also applicable to cases which in the opinion of the Magistrate concerned, ought to be tried by such Court—6 All 477, a*, for instance, cases in which the Magistrate cannot inflict adequate punishment upon the accused—24 Cal 479, 4 Bom L R 85 In such cases the Magistrate must state his grounds in the order of commitment, so as to enable the High Court in revision to judge whether he has exercised a proper discretion—11 Bom L R 18, 8 S. L R 23.

If the case is one which the Magistrate can try and inflict adequate punishment, he cannot commit it to the Sessions, but should try it himself—8 S L R 23, 15 Bom L R 998, 3 A L J 14

If the offence is one triable exclusively by the Court of Session, the Magistrate is bound either to discharge the accused or commit him for trial, but he cannot make over the case for trial to a Deputy Commissioner with special powers under sec 30—7 C W N 457, nor can he try it himself—Ratanlal 953.

It is illegal to commit summons cases to the Sessions—3 A L J 14

207 The following procedure shall be adopted in inquiries before Magistrates where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the Magistrate, ought to be tried by such Court

Procedure in inquiries preparatory to commitment

‘Ought to be tried’ —The words ‘ought to be tried’ in this section and sec 347, must be read with sec 254 A case which ought to be tried by the Court of Sessions is one which the Magistrate is not competent to

try or one in which in his opinion, adequate punishment cannot be inflicted by him—4 Bom L. R 85; 16 Bom 580; 6 A. W. N. 236, 20 Cr L J. 97 (Nag); 11 S L R 79, 8 S L R. 23, 24 Cal. 429. If the case is one which he has jurisdiction to dispose of, & if he can inflict adequate punishment, he should not send up the case for trial to the Court of Session—8 S. L. R. 23; 3 A. L J. 14, 15 Bom L R 998, he should not commit the case if he can try it himself, on the sole ground that the accused had been committed in another case—20 Cr L J 97 (Nag). But in 1917 P R 13 and 42 Mad 83 (dissenting from the above cases) it has been held that the incompetency of the Magistrate to try the case or to pass adequate sentence is not the only ground for committal. The Magistrate may commit for any other sufficient reason. Thus, where the Magistrate committed certain persons to the Sessions on charges under sec 147 I P C, not because he could not pass adequate punishment, but because other persons on the other side have been committed to the Court of Session on charges under Secs 304, 325, 148 and 149 I P. C., it was held that the committal was not illegal—1917 P R 13.

208. (1) The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant (if any), and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or in behalf of the accused, or as may be called for by the Magistrate.

(2) The accused shall be at liberty to cross-examine the witnesses for the prosecution, and in such case the prosecutor may re-examine them.

(3) If the complainant or officer conducting the prosecution, or the accused, applies to the Magistrate to issue process to compel the attendance of any witness or the production of any document or thing, the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so.

(4) Nothing in this section shall be deemed to require a Presidency Magistrate to record his reasons.

Remand of accused before taking evidence—A person arrested under a warrant should be brought promptly before the Magistrate, and the Magistrate has then no authority to further detain him in custody

or remand him to prison, without sufficient cause—20 W R 23 If from the absence of the witness or from any reasonable cause, it becomes necessary or advisable to defer the inquiry the Magistrate instead of immediately examining the complainant and his witnesses, as required by this section may remand the accused person—6 Mad 63 If there is some evidence available and further evidence is forthcoming, it may be desirable to postpone the inquiry for a short period in order that when commenced it may be continuous—6 Mad 63 But the fact that there is or may be a great body of evidence forthcoming against the accused, is not a ground of detention for an inordinate period—6 Mad 63. Similarly, where there is no evidence at all to begin with, a Magistrate would not be justified in remanding the prisoner, in the expectation that evidence might turn up—4 B L R App 1

Taking evidence produced—A commitment made without taking any evidence on a preliminary inquiry is illegal—Ratanlal 100 Under this section it is the duty of the Magistrate to take all evidence tendered by both sides before framing a charge—1 L B R 348 The Code seems to have been carefully framed with a view to provide that no one shall be committed for trial without having previously had a fair opportunity of meeting the charge upon which he is committed—10 B L R 285

In every inquiry into a Sessions case, it is the duty of the committing Magistrate to make a *full* and careful enquiry and to record the *whole* evidence in the case. He should do so even when the accused has made a confession, as confessions are in many cases retracted at the trial—Ratanlal 842 The Magistrate is bound to take *all* such evidence as may be produced (1) in support of the prosecution, (2) on behalf of the accused, and (3) as may be called for by the Magistrate—10 A L J 144. A commitment or discharge without examination of all the witnesses for the prosecution is illegal—4 Mad 227 4 Mad 329 The prosecutor is bound to produce all evidence in his favour directly bearing on the charge, and to call those witnesses who prove their connection with the transaction in question and are able to give important information, unless there is reasonable belief that they will not speak the truth—8 Cal 121 The prosecutor should not refuse to call or put into the witness box any witness for the prosecution merely because the evidence of such witness might in some respects be favourable to the defence—16 All 84 It is his duty to call all witnesses who can throw any light on the inquiry whether they support the prosecution theory or the defence theory—1 P L T 161 But if the prosecutor is of opinion that a witness is a false witness or is likely to give false testimony he is not bound to call that witness—16 All 84, 14 All 521, 15 All 6

try or one in which in his opinion, adequate punishment cannot be inflicted by him—4 Bom L R 85, 16 Bom 580, 6 A W N 236 20 Cr L J 97 (Nag), 11 S L R 79, 8 S L R 23 24 Cal 429 If the case is one which he has jurisdiction to dispose of, *z e* if he can inflict adequate punishment, he should not send up the case for trial to the Court of Session—8 S L R 23, 3 A L J 14, 15 Bom L R 998 he should not commit the case if he can try it himself, on the sole ground that the accused had been committed in another case—20 Cr L J 97 (Nag) But in 1917 P R 13 and 42 Mad 83 (dissenting from the above cases) it has been held that the incompetency of the Magistrate to try the case or to pass adequate sentence is not the only ground for committal The Magistrate may commit for any other sufficient reason Thus, where the Magistrate committed certain persons to the Sessions on charges under sec 147 I P C, not because he could not pass adequate punishment but because other persons on the other side have been committed to the Court of Session on charges under Secs 304 325, 148 and 149 I P C, it was held that the committal was not illegal—1917 P R 13

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(2) The accused shall be at liberty to cross examine the witnesses for the prosecution, and in such case the prosecutor may re examine them

(3) If the complainant or officer conducting the prosecution, or the accused, applies to the **Process for production of further evidence** Magistrate to issue process to compel the attendance of any witness or the production of any document or thing, the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so

(4) Nothing in this section shall be deemed to require a Presidency Magistrate to record his reasons

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If all the witnesses are not called for the prosecution without sufficient cause, the Court may properly draw an inference adverse to the prosecution—8 Cal 121 But no corresponding inference will be drawn against the accused for non production of witnesses He may rely on the witnesses of the case for the prosecution or call witness or meet the charge in any other way he chooses—8 Cal 121 21 C W N 1152 The Magistrate is competent to cross examine the prosecution witnesses in order to consider whether the witnesses are credible or not—17 Bom L R 910

Evidence for the accused —The Magistrate is not empowered to frame a charge or make out an order for commitment until he has taken all such evidence as the accused may produce before him for hearing—20 All 264 The accused must be given an opportunity of adducing evidence on his behalf, and the Magistrate cannot refuse to take it without recording his reasons—Ratanlal 100

Sub section (2)—Right of cross examination —Under this sub section, the accused has a right to cross examine the witnesses for the prosecution Refusal by a Magistrate to allow the accused to cross examine the prosecution witnesses during the inquiry, is arbitrary and improper The deposition of the prosecution witnesses during the inquiry are not to be deemed as duly taken if the accused had not had an opportunity to cross examine them and cannot be treated as evidence at the Sessions trial—21 Cal 642

When to cross examine —Under this section the accused has the right to cross examine the prosecution witnesses before the proceedings have reached the stage in which it may be necessary to draw up a charge—5 C W N 110, 10 A L J 144, 19 O C 239 The proper time for cross examination of a witness in an inquiry under this chapter is in the ordinary course immediately after the examination in chief of that particular witness—5 Bur L T 239 9 L B R 109 As each witness is examined by the prosecution, he should be then and there cross examined by the accused and it is not a convenient procedure to allow cross examination to be reserved until after the examination in chief of all the prosecution witnesses has been finished—10 A L J 144 14 M L T 532, 9 L B R 109 It is improper for a Magistrate, after he has decided to commit an accused for trial, to allow him to cross examine the prosecution witnesses Section 347 should not be read as subject to the provisions of this section—36 Cal 48 35 Bom 163 Ratanlal 975 In 39 Cal 885, however it has been held that it is open to the Magistrate to allow cross examination even after a charge is drawn up

But where a case was at first begun as a warrant case and the accused had not cross examined the witnesses, because in a warrant case he could reserve his right to do so until after the frame of the charges, but after hearing the prosecution evidence the Magistrate came to the conclusion that the case was a Sessions case, and thereupon converted the proceeding into one under this chapter, *held* that the accused had a right to have the witnesses recalled for cross examination, as he has been prejudiced by the sudden change of procedure—19 A. L. J. 463.

Sub section (3) —Summoning witnesses—The accused (as well as the complainant) has the right to call upon the Magistrate to compel the attendance of witnesses who have been summoned but failed to attend—1 C W N 548 But the Magistrate has also a discretion to refuse to issue process, if he thinks it unnecessary to do so The Magistrate may refuse process where there has been inordinate delay in asking for it, *cf* when the accused made the application for process not until the charge was about to be drawn up—36 Mad 321.

Moreover, it is not incumbent on the Magistrate to summon every person named as a witness by the complainant—23 W R. 9 For instance, Hindu ladies of respectability and secluded habits would not be compelled to attend as witnesses when no distinct case is made out against the accused—3 W R 46.

If the Magistrate refuses to issue process he must record his reasons for so doing, if he rejects the application for process without recording reasons he acts illegally—3 All 392

But if the Magistrate issues process for the attendance of witnesses, he is bound to examine them and cannot refuse to do so If he commits an accused to the Sessions without examining the witnesses applied for by the accused under this sub section, the order of commitment is bad in law and must be set aside—26 All 577 So also, where on the application of the accused the Magistrate summoned witnesses for the defence and consented to make a local inspection, but under a direction from the Sessions Judge committed the accused for trial without examining those witnesses and without making the local inspection, it was held that the commitment was illegal, and should be set aside—26 A W. N 306

209 (1) When the evidence referred to in Section 208,

sub-sections (1) and (3), has been taken,
and he has (if necessary) examined the

When accused person
to be discharged

accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such

Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless

Examination of the accused—Object—The object of examining the accused is to enable a Judge to ascertain from time to time particularly if the accused is undefended, what explanation he may offer regarding any facts stated by a witness appearing against him so that these facts should not stand unexplained—1 M H C R 199, 6 Cal 96 But the accused should not be examined for the purpose of making him confess his guilt or admit facts which may go to incriminate him—2 C W N 702 1 C L R 436 1 M H C R 199 10 Mid 295 6 C L R 431

Moreover, the accused should not be examined for the purpose of filling up gaps in the evidence for the prosecution—26 Cal 49 nor for the purpose of supplementing the evidence where it is deficient—1 C L R 436 The accused must be examined as an *accused* and not as *witness* Where on a complaint against two persons for an offence, the committing Magistrate inquired into the case against one of them and examined the other as a *witness*, the second accused could not be committed to the Sessions in the absence of a preliminary inquiry into his case and without examining him as an accused—17 Bom L R 910

Whether compulsory —It is not left to the discretion of the committing Magistrate as to whether he should examine the accused or not he is bound to examine It is the duty of the Magistrate before committing the accused to examine him for the purpose of enabling him to explain any circumstances appearing in the evidence against him If the Magistrate commits the accused without examination, the commitment should be quashed if it has occasioned a failure of justice—23 Mid 636 But in 11 S L R 52, it is laid down that the examination of the accused is in the *discretion* of the Magistrate The Magistrate only examines the accused when he thinks it necessary (see the words 'if necessary' in the section) for the purpose of enabling him to explain any circumstances appearing in the evidence against him If the accused is unwilling to submit to examination it is sufficient for the Magistrate to make a note

of the fact and record it as a reason for not examining the accused. But the accused need not be examined if the Magistrate is satisfied that the evidence for the prosecution does not disclose any proper subject of criminal charge against him—10 W R 25

Mode of examination—The examination should not be conducted in the manner of examination of an adverse witness by counsel. He should not be forced to convict himself after a series of searching questions the exact effect of which he may not really comprehend—6 Cal 96

The accused should not be ordered to file any written statement—2 Weir 255, but if he chooses to make any statement the Court should not refuse to allow him to do so—10 C L R 54

Duty of Magistrates—sufficient grounds—A Magistrate should not commit an accused to the Sessions simply because the case is a Sessions case and because the evidence for the prosecution discloses an offence. He may examine the accused and his witnesses and decide whether there are sufficient grounds for commitment—19 A W N 135

Where charges exclusively triable by a Court of Session are brought before a Magistrate and some evidence is offered in support thereof it is not his duty in all cases to commit the accused to the Sessions. The Magistrate should exercise his discretion and after weighing the evidence decide whether or not he should try the case himself—37 C L J 34

In deciding whether there are sufficient grounds for commitment, the Magistrate is to see whether there are credible witnesses to facts which if believed by a jury would justify the conviction of the accused. It is not the duty of the Magistrate to weigh the evidence. If he proceeds to weigh the evidence, to accept some statements and to reject others, to deal with probabilities or to draw inferences as to knowledge or intention, he is in reality dealing with the question of the guilt or innocence of the accused and is usurping the functions of the trial Court. He must not in any way encroach upon the functions of the jury—14 M L T 200, 11 Bom 372, 27 Bom 84, Ratanlal 319, 21 Cr L J 202 (Pat). *Contra*—5 All 161, 26 All 564, 1 P L T 153, 42 M L J 49 and 12 C W N 117 where it has been held that it is competent for the Magistrate to weigh the evidence & to examine the credibility of the evidence adduced in the course of the inquiry.

But the Magistrate has no power whatever to pronounce a definite judgment on the question whether the accused is guilty or innocent. The question he has to decide is whether there are sufficient grounds for committing the accused to trial and not whether the accused is innocent or guilty—26 All 564, 5 All 161

Subsection (2)—Discharge at early stage —Subsection (2) relieves a Magistrate from the necessity of going on with an inquiry or trial when he is reasonably convinced, on what has been already deposed to, that a criminal charge cannot be sustained—Ratanlal 201

Interference by High Court —The High Court can interfere with an order of discharge by a Presidency Magistrate, not under this Code, but by virtue of the power given by sec 15 of the Charter Act—27 Cal 126 33 Cal 1282, 6 C L J 705 In 2 Weir 255 27 Bom 84 and 36 Cal 994 it was held that the power of revision can be exercised under *this Code*

210 (1) When, upon such evidence being taken and When charge is to be framed such examination (if any) being made the Magistrate is satisfied that there are sufficient grounds for committing the accused for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged

(2) As soon as *such* charge has been framed, it shall be read and explained to the accused, Charge to be explained and copy furnished to accused and a copy thereof shall, if he so requires, be given to him free of cost

Change —The words “such charge” have been substituted for the words “the charge” “We have made this verbal amendment to meet a suggestion of the Bengal Government” —*Report of the Select Committee of 1916*

“Upon such evidence” —See section 208 It is illegal to commit an accused without taking any evidence in the preliminary inquiry—Ratanlal 100 So also, it is illegal to frame a charge or order commitment without taking *all* the evidence produced by the accused—20 All 264 If the case is transferred from the Court of one Magistrate to another, the latter can commit the case to the Sessions, acting upon the evidence recorded by the former—36 All 315

Sufficient grounds —See notes under section 209 A commitment can be made only when there are sufficient grounds for committing that is to say, not merely sufficient allegations as to the offence which may or may not be credible, but such grounds as satisfy the Magistrate as being sufficient to support a charge A District Magistrate cannot therefore order a Subordinate Magistrate to commit a case unless it appears that the latter had no good reason to discredit the prosecution witnesses and that their evidence was sufficient in law to form the basis of a conviction—2 Bom L R 225

The discretion given to Magistrates to decide whether there are sufficient grounds for commitment is a judicial discretion and must be exercised with care and on some proper ground. It is an improper exercise of discretion to add a grave charge, without sufficient evidence, for the mere purpose of committing the case to the Sessions—11 Bom L R 18

Commitment of case triable by Magistrate—A Magistrate is competent to commit a case not exclusively triable by the Court of Session, if he cannot inflict adequate punishment in the case. See notes under sections 206 and 207

But a Magistrate going on leave does not exercise proper discretion if he commits a case triable by himself to the Sessions simply because the witnesses for the accused are not in attendance and it would be inconvenient for his successor to begin the trial afresh—Ratanlal 110; so also, a Magistrate ought not to commit the accused in a case of theft, merely because the case was connected with another case which he was bound by law to commit—15 Bom L R 998

Joint indictment of several persons or several offences—When two or more persons are jointly indicted, and the jurisdiction of the Magistrate is ousted in the case of one of them by reason of the offence committed by him being one triable only by the Court of Session, the proper course is to commit all of them to the Sessions, and not to try that one person himself and commit the others to the Sessions—1 Weir 448, 22 Cr L J 480 (Cal)

Frame of charge—See section 216 as to procedure in case of commitment without any charge, or with an erroneous or imperfect charge

The Magistrate when he has framed a charge is bound to read it out to the accused, and to ask him if he wishes to have any witnesses summoned to give evidence on his behalf before the Sessions Court—2 W R 50

Powers of Sessions Court—When a Magistrate has given his reasons for committing the case for trial, the Sessions Judge must either accept the charge as framed or frame others himself. But the Code does not authorise him to insist on a re drawing of the charge by the Magistrate, unless he specifies the charge which he wishes to be sent up—25 W R 17

Effect of frame of charge—The framing of a charge does not amount to an order of commitment, and after the charge is framed the Magistrate does not become *functus officio* in respect of the charge. He can amend the charge or can proceed with the case himself, he can consider whether he ought to commit or not—12 Bom L R 521. He can even discharge the accused. See sec 213 (2) and notes thereunder,

order committing the accused for trial by the High Court or the Court of Session (as the case may be), and (unless the Magistrate is a Presidency Magistrate) shall also record briefly the reasons for such commitment

(2) If the Magistrate, after hearing witnesses for the defence, is satisfied that there are not sufficient grounds for committing the accused, he may cancel the charge and discharge the accused

Commitment —As to when Magistrates should or should not commit see notes under sec 209

Commitment made in the *absence* of the accused is illegal—5 C W N 110 but where the accused was allowed to appear by an agent under section 205, a commitment made in the absence of the accused, but in the presence of the agent, is not illegal—2 W R 50

Commitment after discharge Where a Magistrate after examining four witnesses for the prosecution discharged the accused, but subsequently becoming aware that there was a fifth witness, he cancelled his order of discharge, examined the witness and committed the accused to the Sessions, it was held that the commitment was not illegal—7 M H C R App. 40

Commitment to wrong Sessions —See notes under section 177

Signature of Magistrate —The signature of the Magistrate to the warrant of commitment should not be impressed with a stamp But such a signature is only an irregularity and does not vitiate the proceedings—6 Mad 336

Reasons for commitment —The Magistrate shall briefly record the reasons of commitment If a Magistrate commits a case triable by himself he is bound to record his reasons for commitment, so as to enable the High Court to judge whether the commitment is a sound exercise of discretionary power—11 Bom L R 18, he must state why the case was not disposed of by himself—8 S L R 23

The Magistrate in his grounds of commitment should specify exactly and precisely the proof against each particular prisoner and the manner in which it is supported—5 W R 6

Commitment of some, trial of others —Where several persons are jointly charged with the same offences, and it is considered necessary to commit one of them to the Sessions, the most convenient course is that *all* the prisoners should be committed and not that the one person should be committed and the others tried by the Magistrate himself If however the Magistrate adopts the latter course, it cannot be said

that he has acted in contravention of any provisions of law—2 Weir 258, 1 Weir 448

Joint commitment—Where several persons are jointly charged with having committed an offence, especially in cases of rioting etc., where there are two hostile parties, each person should be committed for trial separately and not all together, and the trial should also be separate—8 W R 47, but a commitment is not to be set aside as illegal because all the accused were jointly committed. The section of the Code relating to joinder of charges, and the Privy Council ruling in 25 Mad 61 refer to *trials* only and not to *commitments*—26 Mad 592, 20 A W N 206, 7 Bom L R 457. *Contra*—Ratanlal 925. In such cases of joint commitment, the Sessions Judge should frame separate charges and try the accused separately, as if there had been separate commitments—26 Mad 592, 20 A W N 206.

Subsection (2)—Scope—Subsection (2) is intended to provide for cases where the evidence recorded after charge so changes the aspect of the case as to leave no reasonable doubt that a conviction is not sustainable, but it does not apply where the evidence for the defence merely casts some doubts on the case—1 L B R 348. Under this subsection, the Magistrate has a discretion even after he has framed a charge, of cancelling it, if after hearing the evidence for the defence he considers that there are no longer sufficient grounds to put the accused on his trial—U B R (1917) 3rd Qr 29. If the Magistrate after hearing the defence witnesses comes to the conclusion that their evidence rebuts the evidence produced for the prosecution or renders it so incredible or unreliable that a conviction will not follow, he may act upon his opinion and pass an order of discharge under this subsection—44 All 57.

This subsection did not exist in the earlier Codes. It enables a Magistrate to discharge an accused even after a charge is framed. The ruling in Ratanlal 161 (decided under the Code of 1872) which held that an order of discharge after the drawing up of the charge was illegal, must be taken as overruled by this subsection.

214 [Repealed]

This section has been repealed by the Criminal Law Amendment Act (VII of 1923). It provided that if an European British subject and an Indian subject were jointly accused of an offence triable by a Court of Session the Magistrate must commit the case to the High Court and not to the Sessions Judge.

215 A commitment once made under Section 213 or once made under Section 213 by a competent [* *] by a competent Magis-

order committing the accused for trial by the High Court or the Court of Session (as the case may be), and (unless the Magistrate is a Presidency Magistrate) shall also record briefly the reasons for such commitment

(2) If the Magistrate, after hearing witnesses for the defence, is satisfied that there are not sufficient grounds for committing the accused, he may cancel the charge and discharge the accused

Commitment —As to when Magistrates should or should not commit, see notes under sec 209

Commitment made in the absence of the accused is illegal—5 C W N 110 but where the accused was allowed to appear by an agent under section 205, a commitment made in the absence of the accused, but in the presence of the agent, is not illegal—2 W R 50.

Commitment after discharge —Where a Magistrate after examining four witnesses for the prosecution discharged the accused, but subsequently becoming aware that there was a fifth witness, he cancelled his order of discharge, examined the witness and committed the accused to the Sessions, it was held that the commitment was not illegal—7 M H C R App. 40

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Subsection (2)—Scope—Subsection (2) is intended to provide for cases where the evidence recorded after charge so changes the aspect of the case as to leave no reasonable doubt that a conviction is not sustainable, but it does not apply where the evidence for the defence merely casts some doubts on the case—1 L B R 348. Under this subsection, the Magistrate has a discretion even after he has framed a charge, of cancelling it, if after hearing the evidence for the defence he considers that there are no longer sufficient grounds to put the accused on his trial—U B R (1917) 3rd Qr 29. If the Magistrate after hearing the defence witnesses comes to the conclusion that their evidence rebuts the evidence produced for the prosecution or renders it so incredible or unreliable that a conviction will not follow, he may act upon his opinion and pass an order of discharge under this subsection—44 All 57

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Section 214 by a competent	[* *] by a competent Magis-

without examining the witnesses for the defence—26 A W N 306 15 Mad 39, (8) Where the commitment was made without examining the witnesses for the prosecution—4 Mad 227, or without examining the witnesses for the defence—26 All 177 26 A W N 306, 26 All 177, 26 A W N 306, 20 All 264, (9) Where the Magistrate committed the approver who had broken the conditions of pardon tendered to him, along with the other co accused—23 Bom 493, 20 All 529 or where such approver was committed before the trial of the other accused was finished—14 All 336

What are not proper grounds for setting aside commitment — (1) The High Court cannot set aside a committal merely because the Magistrate made a joint commitment of several accused—see 26 Mad 592, 26 A W N 306 and 7 Bom L R 457 cited under sec 213 (2) A commitment cannot be quashed on the ground that it was based on insufficient evidence—1 W R 8 13 Bom L R 201, or that it was made without direct evidence—4 C W N 561 (3) Where a Magistrate going on leave committed to the Sessions a case triable by himself on the ground that the witnesses were not in attendance and that his successor would find it inconvenient to try the case afresh, it was held that the commitment was merely irregular and not illegal so as to justify the High Court to quash it—Ratanlal 110 (4) A commitment is not illegal because it is made to the same Sessions Judge who gave the direction for the prosecution of an accused for an offence (giving false evidence) committed before him—1 Bom 311 (5) A commitment is not illegal merely because the Magistrate has proceeded on the report of a police officer and has not made a judicial inquiry into the complaint—6 Cal 582 (6) A commitment is not illegal for want of sanction where no such sanction (under section 197) is required & where the offence was committed by a public servant in his private and not official capacity—13 C P L R 126

(7) The fact that some of the accused were committed while other persons who were concerned in the offence had not yet been arrested, is not a ground for setting aside the commitment—7 M L T 187 (8) A commitment ought not to be quashed on the ground that a civil suit is pending in respect of the subject matter of the offence—18 Bom 581, but the trial of the case may be postponed until the determination of the civil suit—2 W R 760 (9) Where the Sessions Judge had no jurisdiction over the place of offence and the objection taken on this point was overruled by the Sessions Judge, the High Court held that there was no sufficient ground for questioning the commitment—17 Mad 402

216 When the accused has given in any list of witnesses under Section 211 and has been committed for trial, the Magistrate shall summon such of the witnesses included

*Summons to witnesses
for defence when
accused is committed*

in the list, as have not appeared before himself, to appear before the Court to which the accused has been committed.

Provided that, where the accused has been committed to the High Court, the Magistrate may, in his discretion, leave such witnesses to be summoned by the Clerk of the Crown, and such witnesses may be summoned accordingly.

Provided, also, that if the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay, or of defeating the ends of justice, the Magistrate may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material, and, if he is not so satisfied, may refuse to summon the witness (recording his reasons for such refusal), or may before summoning him, require such sum to be deposited as such Magistrate thinks necessary to defray the expense of obtaining the attendance of the witness and all other proper expenses.

*Refusal to summon
unnecessary witness
unless deposit made*

'Shall summon'—Where the accused has made an application for summoning witnesses the Magistrate must deal with the application and pass an order either granting the prayer of the petition or refusing it. He should not simply order the application to be filed.—6 C W N 548. Where a witness once summoned failed to appear, there being some delay in the service of summons the Magistrate is bound to make a second attempt (the first attempt being a nominal one) to secure the attendance of the absent witness.—4 All 53.

Second proviso—The second proviso is not intended to enable the Magistrate to inquire generally into what the defence of the accused is to be, and to consider whether on learning the nature of the defence he is absolutely to abstain from summoning the whole of the witnesses cited by the accused. The meaning of this proviso is that if among the persons named by the accused as witnesses the Magistrate consider that any particular witness is included for the purpose of vexation and delay, he is to exercise his judgment and enquire whether such witness is

will be treated as forming *one transaction* within the meaning of Sec 235 of the Code—30 Mad 328

'One year'—The time covered by the several acts must not be more than one year where the charge related to items misappropriated in the course of two years, the conviction was quashed—19 5 P R 14

223. When the nature of the case is such that the particulars mentioned in Sections 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose

When manner of committing offence must be stated

Illustrations

(a) A is accused of the theft of a certain article at a certain time and place. The charge need not set out the manner in which the theft was effected

(b) A is accused of cheating B at a given time and place. The charge must set out the manner in which A cheated B

(c) A is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by A which is alleged to be false

(d) A is accused of obstructing B a public servant in the discharge of his public functions at a given time and place. The charge must set out the manner in which A obstructed B in the discharge of his functions

(e) A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B

(f) A is accused of disobeying a direction of the law with intent to save B from punishment. The charge must set out the disobedience charged and the law infringed

The question as to whether further particulars are necessary under this section is a question of discretion in each case—39 Cal 781

A charge of an attempt to cheat must specify the person attempted to be cheated and the manner in which the attempt was made—8 C W N 278

224. In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable.

Words in charge taken in sense of law under which offence is punishable.

225. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

Illustrations.

(a) A is charged, under section 242 of the Indian Penal Code with "having been in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit," the word "fraudulently" being omitted in the charge. Unless it appears that A was in fact misled by this omission, the error shall not be regarded as material.

(b) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge, or is set out incorrectly. A defends himself, calls witnesses and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material.

(c) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B and A had no means of knowing as to which of them the charge referred, and offered defence. The Court may infer from such facts that the omission to set out the manner of cheating was, in the case, a material error.

(d) A is charged with the murder of Khoda Baksh on the 21st January 1882. In fact the murdered person's name

was Haidar Baksh, and the date of the murder was the 20th January 1882. A was never charged with any murder but one and had heard the inquiry before the Magistrate, which referred exclusively to the case of Haidar Baksh. The Court may infer from these facts that A was not misled and that the error in the charge was immaterial.

(e) A was charged with murdering Haidar Baksh on the 20th January 1882 and Khoda Baksh (who tried to arrest him for that murder) on the 21st January 1882. When charged for the murder of Haidar Baksh, he was tried for the murder of Khoda Baksh. The witnesses present in his defence were witnesses in the case of Haidar Baksh. The Court may infer from this that A was misled and that the error was material.

Error or omission—Where the common objects of an unlawful assembly were to steal mangoes and to cause the death of a person, and the Judge in summing up the case to the jury spoke of the two objects, but the charge mentioned only the latter object, it was held that the omission to specify both the objects in the charge was material, in as much as it is difficult to say which of the two common objects had been accepted by the jury, and if the jury had accepted that object which was not mentioned in the charge, there had been a failure of justice—22 Cal 276.

When the charge against the accused was that he embezzled some deeds but he was convicted of embezzling some amounts obtained by dealing with those deeds, it was held that the charge was materially defective and the conviction must be set aside—12 C. W. N. 577

A charge of sedition is not defective if it omits to state the particular passages or particular words used by the accused; it is sufficient if the substance of the words is set out. Even if it is defective, it will be cured by S-c. 225—33 Bom 77, 32 Mad 384, 32 Mad. 3. The omission of words such as "unlawfully", or "in British India" is not material, and is cured by this section—10 B. H. C. R. 373; 42 Cal 957

If the charge is drawn up in a somewhat informal manner, but is sufficiently explicit as to give the accused notice of the charge, the irregularity will be cured by this section—32 Bom 77.

Test to determine whether error is material—In determining whether the error or omission has occasioned a failure of justice the Court should have regard to the manner in which the accused has conduc-

ted his defence, and to the nature of the object, i.e. whether the objection could and should have been raised at an earlier stage of the proceedings—10 B H C R 373, 10 Bom 124

Duty of Magistrate—Where a charge is erroneous as to the intention with which the offence was committed, it is the duty of the Magistrate before convicting the accused for committing the offence with a different intention, to amend the charge to that effect so as to give notice to the accused of what he is charged with. Thus, where the charge was house breaking with intention to commit theft, but it was found that the intention was criminal intrigue with a woman in the complainant's house, the Magistrate, before convicting the accused of house breaking with the latter intention should clearly draw up a charge to that effect—41 Cal 743

226 When any person is committed for trial without a charge or with an imperfect or erroneous charge, the Court, or, in the case of a High Court, the Clerk of the

Procedure on commitment without charge or with imperfect charge

Crown, may frame a charge or add to or otherwise alter the charge, as the case may be, having regard to the rules contained in this Code as to the form of charges

Illustrations

1 A is charged with the murder of C. A charge of abetting the murder of C may be added or substituted

2 A is charged with forging a valuable security under Section 467 of the Indian Penal Code. A charge of fabricating false evidence under Section 193 may be added

3 A is charged with receiving stolen property knowing it to be stolen. During the trial it incidentally appears that he has in his possession instruments for the purpose of counterfeiting coin. A charge under section 235 of the Indian Penal Code cannot be added

Charge—Throughout this Code, the word 'charge' is generally used as the statement of a specific offence and not as indicating the entire series of offences of which a prisoner is accused, and it is in the former sense that the word is used in this and the following sections—8 Bom, 200

Without charge —These words apply not only to the cases where there is no charge at all, but also to cases in which there is no charge in respect of such offence as the Sessions Judge or Clerk of the Crown may think the accused ought to be tried for—8 Bom 200

'Frame a charge' —At the beginning of the trial, if the Judge finds that the Magistrate has omitted to frame a charge, he may supply the omission and frame the charge that is made out on the evidence recorded by the Magistrate—9 S L R 37

Add a charge —If the charge framed by the Magistrate is imperfect or erroneous, the Judge may alter or add to the charge, having regard to the offences disclosed in the evidence recorded by the Magistrate. But the Sessions Judge cannot go beyond the evidence recorded by the Magistrate, in adding to or altering the charge. He cannot add or alter a charge upon the evidence recorded by *himself* at the trial. If he does so, the effect is that he takes cognizance of an offence without any preliminary inquiry in respect of it by the Magistrate and the provisions of Sec 193 of this Code are rendered nugatory. Thus where the charge drawn up by the Magistrate was under Sec 202 I P C and the Sessions Judge, on the application of the Public Prosecutor, added a charge for an offence under secs 209 and 201 I C P upon evidence of a person who was examined as witness for the first time by the Sessions Judge, it was held that the action of the Judge was *ultra vires*, and the addition of the charge was not merely an error of procedure but an improper assumption of jurisdiction—3 Mad 351. In 9 S L R 27, however, it has been held that under sec 227 the Sessions Judge has power to add a charge for an offence disclosed by the evidence taken before himself.

Again, the Sessions Court can add or alter a charge with reference to the immediate subject of the prosecution and commitment, and not with regard to a matter not covered by the indictment. Thus where a prosecution was instituted by A on a charge under sec 417 I. P C and the Sessions Judge altered the charge into one for an offence under sec 420 I. P C for cheating B, it was held that the procedure was illegal inasmuch as there was no complaint by B, and the prosecution was instituted by a person in respect of a matter with which B was not concerned, and the Magistrate did not commit the accused with respect to any offence committed against B—32 Cal 22. Similarly, where the accused was committed to the Sessions for the murder of A, the Sessions Judge could not add a charge for causing grievous hurt to B—1909 P. W. R 20. In 8 All 665, however, such a procedure was not treated as an illegality but a mere irregularity, and the High Court refused to interfere because no prejudice was caused to the accused.

The Sessions Judge's power to add a charge is not fettered by the fact that a complaint in respect of it had been previously preferred before the Magistrate and dismissed by him—16 Bom 414

Power to expunge a charge—The Sessions Judge has power to frame, add or alter a charge, but he has no power to expunge a charge duly framed by the committing Magistrate—7 C L R 143

Charge when can be added or altered—Though the Sessions Judge has power to add a charge at any stage of the proceedings before judgment, still he should exercise a sound and wise discretion, and he does not exercise such a discretion when he adds a new and grave charge after the close of the defence—6 C W N 72 A charge cannot be altered after delivery of verdict—5 B H C R 9

Alter a charge—The Sessions Judge can substitute a charge of abetment for a charge of the substantive offence—11 B H C R 278 If the committing Magistrate does not frame a charge with separate heads for each distinct offence, the defect may be remedied by the Sessions Judge—7 W R 8 In a case in which the accused was charged with 45 offences and committed to the Sessions, the proper procedure is to amend the charge and to hold separate trials and not to confine the prosecution to three heads of charges, acquitting the accused of all the rest—8 Cal 450

Altering a charge includes the *withdrawal* of a charge which has been added by the Sessions Judge after commitment—12 All 551.

227 (1) Any Court may alter or add to any charge at any time before judgment is pronounced, or, in the case of trials before the Court of Session or High Court, before the verdict of the jury is returned or the opinions of the assessors are expressed

(2) Every such alteration or addition shall be read and explained to the accused.

Addition or amendment of charge—The words 'or add to' are new and did not exist in Code of 1882 Under that Code it was held that the power to add a charge was confined only to a Sessions Court under section 226—see 8 All 665 The ruling in 8 Bom 200 which laid down that the addition of a new charge was not permitted by this section is no longer good law

A Court of Session, though vested with large powers of amending and adding in charges, can only do so with reference to the immediate

subject of the prosecution and committal, and not with regard to matter not covered by the indictment—1920 M. W. N. 149

The amendment of a charge ought to be made formally, and should appear on the face of the record—9 W. R. 14, and the Court should record reasons or at least a statement as to the necessity of such amendment—1 Agra 67 In amending a charge, the Magistrate should not write over the original charge but should leave it on the file for reference and should write the new charge separately—8 Bur. L. T. 17

The Court in substituting one charge for another cannot ignore the preliminary requisites of a charge, thus a charge for rape cannot be altered into a charge for adultery, because the complaint of the husband is a preliminary requisite in the latter offence—29 Cal. 415, nor can the Court alter a charge of rape into a charge for rape and adultery in the alternative—5 All. 233 See notes under sec. 199

But the power to add a charge is not limited by the terms of the certificate under section 188. Once a certificate has been obtained, the Court has power to add any charge for any offence disclosed by the facts though not specified in the certificate—33 All. 514 See notes under section 188

Where a prisoner has been extradited for dacoity the Court may alter the charge of dacoity into theft—17 Bom. 369

Amendment must not prejudice accused—Although this section gives power to the Court to add or alter a charge, still this power should be exercised with discretion, and it is the duty of the Court to see that the accused is not prejudiced by the addition or alteration of charges. See 9 S. L. R. 37, 6 B. H. C. R. 76 Thus, an addition or alteration of charges at a late stage of the proceedings would prejudice the accused in his defence and would be illegal. See 6 C. W. N. 73, 31 Bom. 218

Where upon the trial of an accused person upon specific charges in a Court of Session, it is found at the conclusion of the trial that the charges as framed disclose no offence against the accused, it is illegal and prejudicial to the accused to alter or amend the charges and to convict him thereon without affording him an opportunity of meeting the amended or altered charges. The fact that the accused cross examined the prosecution witnesses to prove the unsustainability of the charges as originally framed, is no ground for holding that by substantially altering the charges the accused was not prejudiced—1920 M. W. N. 149

Amendment cannot cure illegality—An illegal charge cannot be amended or altered, and such amendment will not cure the illegality. Thus, where a charge was drawn up of four offences, it was wholly illegal, and the illegality cannot be cured by striking out one of the offences, and convicting the accused for the remaining three—29 Mad.

Addition or alteration when to be made :—Although a charge may be added or altered at any time before the judgment is pronounced still it is illegal to do so at a late stage of the proceedings, *e. g.* after the prosecution case has closed and the defence evidence recorded—31 Bom. 218; 6 C. W. N. 73. Such a procedure would be prejudicial to the accused.

If the complainant compounds the offence, the Court should acquit the accused upon the presentation of the petition of composition, and has no power to alter the charge already drawn up—1914 P. R. 29

In a trial by jury or assessors the Sessions Court has no power to alter the charge after the delivery of the verdict or the opinion of the assessors—5 B. H. C. R. 9; 1916 P. R. 33. The words "return of verdict" mean the return of the final verdict which the Judge is bound to record—8 Bom. 200

Application for alteration of charge —An application for alteration of charge must be made immediately after the original charge has been read and explained by the Magistrate—27 Cal 839; and the Magistrate should consider the application at once and not postpone passing his order on the application—16 Bom. 414.

Sub section (2) —When a new charge was read aloud to the jury, but was not specially explained to the prisoner, and he was not called upon to plead to that charge, but his counsel on being asked did not require a new trial (section 229) it was held that the accused was not prejudiced by the addition of the new charge, and the omission would not affect the trial—8 Bom. 200.

228 If the charge framed or alteration or addition made under section 226 or section 227 is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such charge or alteration or addition has been framed or made, proceed with the trial as if the new or altered charge had been the original charge.

When trial may proceed immediately after alteration.

The addition or alteration of a charge does not open up the trial from the beginning, and the Court may immediately proceed with the trial if it is of opinion that there will be no prejudice to the accused. If the accused has already been examined under sec. 342, before the amendment of the charge and before he has been called upon to enter

attempted to use as true or genuine, was false or fabricated. If the Court thinks it probable that A had such knowledge, and that he was misled in his defence by the omission from the charge of the statement that he had it, it shall direct a new trial upon an amended charge, but if it appears probable from the proceedings that A had no such knowledge, it shall quash the conviction.

Errors in the charge—If the Chief Court (High Court) thinks that in consequence of material errors in a charge, the accused has been misled, it is bound to direct a new trial to be had upon a charge framed in the proper manner—1916 P R 33. Where the owners of land were charged under sec 154 I P C for omission to give information of the riot to the thana, but they were convicted for the omission on the part of their agents, and not of themselves, it was held that the error in the charge prejudiced the accused and a new trial was ordered by the Appellate Court—7 C W N 201. Where the charge framed against the accused was to the effect that they caused hurt under sec 324 I P C to a certain person by means of a *dao* (a cutting instrument) but they were convicted under sec 354 I P C for assault with a *lathi*, it was held that the accused might have been prejudiced in the defence by this error in the charge and a retrial was ordered—17 C W N 419.

Charge for one offence—Conviction for another—Where the accused were charged with and convicted of rioting and on appeal the Sessions Judge set aside the conviction for rioting but convicted them for house trespass and hurt, it was held that the latter offences, being distinct and separate offences from rioting, should have formed the subject of separate charges, and the accused had been prejudiced within the meaning of this section by the omission of charges for the latter offences—30 Cal 288. See also 18 C W N 1274, and 18 C W N 1276, where the conviction was quashed on similar grounds.

Where the accused was charged for dishonestly using as genuine a forged instrument, but was convicted for defamation it was held that not only should the conviction be set aside, but also as there was nothing to show that any valid charge could be preferred against the accused for the offence of defamation, no trial could be held (see sub sec 2)—28 Cal 63.

Joinder of Charges

233 For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be

*Separate charges
for distinct offences*

tried separately, except in the cases mentioned in sections 234, 235, 236 and 239

Illustration

A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and causing grievous hurt

Object of Section—The object of this section is to see that the accused is not bewildered in his defence by having to meet several charges in no way connected with one another—19 C W N 972, and to see that he is not prejudiced by being accused of several things at once—55 Bom 491. Another object is that the mind of the Court might be prejudiced against the prisoner if he were tried in one trial upon different charges resting upon different evidence. It might be difficult for the Court trying him on one of the charges not to be unduly influenced by the evidence against him on the other charges—7 All 174

The general law as to the trial of accused persons is embodied in this section which provides for separate trial of each accused person for every distinct offence, and the exceptions are laid down in sections 234, 235, 236 and 239 which must be strictly construed so as not to defeat the right of independent trial conferred by the general law—5 P L J 11.

Scope of section—These sections (233-239) relating to joinder of charges refer to the *trial* of the accused. The ruling in *Subrahmanya Aiyar's Case*, 25 Mad 61 (cited below) cannot be extended to preliminary inquiries held by Magistrates committing a case to the Sessions, so as to render the commitment itself illegal because there was misjoinder of offences or offenders at the preliminary inquiry—26 Mad 592, 35 M L J 259. See notes under sec 215

This section applies not only to warrant cases, but also to *summons cases*, although it is not necessary to frame a charge in the latter cases. Therefore a joint trial and conviction for several distinct offences in summons cases is illegal—3 L B R 52. It also applies where the accused is charged with a summons case and a warrant case—3 L B R 413

It also applies to trials under the Beogal Excise Act, and the fact that the trial has taken place as in a summons case does not exclude the operation of this section—41 Cal 694

This section applies not only to original trials, but the Appellate Court is also bound by it, thus no Appellate Court acting under section

423 (1) (b) and altering the finding cannot act in contravention of the provisions of section 233—(1905) P R 38

'Distinct offences' —When two offences are committed and each of these two offences has no connection with the other, they are distinct offences—10 C W N 972

What are distinct offences —(1) *Offences falling under different sections* of the I P C e.g. theft and escape from lawful custody—3 L B R 221, Kidnapping a boy and assaulting the mother who demanded the boy—26 Mad 454, theft and receiving stolen property—28 Cal 10, 1 C W N 35, receiving stolen property, and habitually dealing in stolen property—8 Cal 634 criminal misappropriation and cheating—13 C W N 1089, offences under secs 167 and 466 I P C—8 Cal 450, offences under secs 411 and 489 C I P C—29 Cal 387; offences under secs 454 and 325 I P C—2 L B R 19, offences under secs 182 and 500 I P C—37 Cal 604, theft in a dwelling house and abetment of criminal breach of trust—5 C W N 294 abetment of falsification of document and fraudulent destruction of document—26 Mad 125, theft and receiving illegal gratification for the restoration of stolen property—14 Bur L R 67, offences under secs 330 and 348 I P C—(1919) M W N 199, offence of belonging to a wandering gang of dacoits and the offence of committing dacoity—2 A W N 178, offences under secs 411 and 458 I P C—1905 P R 51

(2) *Offences committed on different occasions* even though the offences be of the same kind (i.e. falling under the same section of the I P C) e.g. two attempts to cheat committed on two different dates—2 C L J 618, or wrongful confinement and torture committed at several distinct times and places—(1919) M W N 199, receiving stolen articles on different occasions, though the articles were the proceeds of a single burglary—2 P L T 47.

(3) *Offences committed against different persons*—11 C W N 54; e.g. misappropriation of three sums of money from three distinct persons—6 C L J 757, or cheating three persons—41 Cal 66, or hurt caused to two persons—19 C W N 972, wrongful confinement of several persons on several occasions—(1919) M W N 199

(4) *Offences in respect of distinct sums of money* e.g. misappropriation of two sums of money collected on different dates—40 Cal 846; misappropriation by the accused of three sums of money collected in accordance with their duty as tax collector from three persons—6 C L J 757

What are not distinct offences —Offences of the same kind committed on one occasion though consisting of parts are not different offences but are to be treated as constituting one offence, e.g. the

making of any number of false statements in the same deposition is one aggregate case of perjury and charges need not be multiplied according to the number of false statements—36 Cal 808 So also, the stealing of several bullocks from the same man at the same time is but one offence, and there need not be as many charges as the number of bullocks stolen—1 A W, N 154 So also, misappropriation of several books of account in respect of the same estate though on different occasions is but one offence, the several books of account forming one set of books—17 C W N 479 So also misappropriation of several sums of money on several occasions in regard to one individual is one offence—14 Cal 128 Receiving on one occasion various items of stolen property, the result of various thefts, is only one offence—3 Bom L. R. 187 Receiving a bribe partly on one day and partly on another is one offence—5 C W N 332 Theft of a box and a bicycle from one person committed at the same time is one offence—21 Cr L J 682 (Cal)

Separate charge —For every distinct offence, there shall be a separate charge Separate offences should not be lumped together in one single charge, but each offence should form a separate head of charge and for every head of charge there should be a distinct finding and sentence—3 N W P H C R 314 Even though the offences be committed in the same transaction there should be a distinct charge for each distinct offence, though they can be tried together under sec 235—10 C W N 53, 26 All 195 See also the cases cited under heading '*what are distinct offences*' above In almost all these cases, it has been held that the framing of one charge in respect of several distinct offences is not merely an irregularity but an illegality, and the conviction on such a charge was set aside But in 11 C W N 54, 41 Cal 66; and 19 C W N 972 it was held that the error in framing one charge is an error in form rather than of substance, and does not amount to an illegality, but a mere irregularity cured by sec 537 In 1919, M W N. 199, the Judges differed in opinion on this point

Alternative charges of contradictory statements —Where a person was charged in the alternative with having made two contradictory statements, one to a public servant and another, contradicting the first, on oath before a Magistrate, and was convicted in the alternative either under sec. 182 or under sec 193 I P C, the Magistrate being unable to find which of them was false, it was held that the charge was not made in accordance with this section, there were two distinct offences for which two separate charges were necessary—10 Bom 124 See also Ratanlal 503 But now see section 236 and Illustration (b) to that section

Joint trial illegal —The accused was charged and tried at one trial with several distinct offences extending over a period of one year,

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What are not distinct offences —Offences of the same kind committed on one occasion though consisting of parts are not different offences but are to be treated as constituting one offence *e.g.* the

and convicted of, offences under sections 411 and 414 of the Indian Penal Code

(k) A exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure. A may be separately charged with, and convicted of, offences under sections 317 and 304 of the Indian Penal Code

(l) A dishonestly uses a forged document as genuine evidence in order to convict B a public servant, of an offence under section 167 of the Indian Penal Code. A may be separately charged with and convicted of offences under sections 471 (read with 466) and 196 of the same Code
to sub section (3)—

(m) A commits robbery on B, and in doing so voluntarily causes hurt to him. A may be separately charged with, and convicted of, offences under sections 323, 392 and 394 of the Indian Penal Code

Scope—This section must not be taken as controlled by the words 'not exceeding three' occurring in sec. 234: there is nothing in this section to warrant the rule that not more than three offences can be combined, even if those offences have been committed in the same transaction—19 A. L. J. 392

Same transaction—The expression 'same transaction' used in secs. 235 and 239 is an expression which from its very nature is incapable of exact definition and must have been advisedly used because it had this quality—1 S. L. R. 73. 'We think it would be dangerous if not impossible to attempt any definition of the phrase 'in the course of the same transaction'. An exhaustive definition is not feasible, and if the phraseology is altered the Courts would be deprived of the guidance which they now have from a long series of rulings on the point. We do not find that there has been any pronounced conflict of opinion the reason being that the Courts instead of attempting to lay down general principles, as a rule discuss each case on its merits'—*Report of the Joint Committee (1922)*

The question whether the acts are so connected together as to form part of the same transaction is a question of fact—1910 M. W. N. 541, and the arena of facts covered by the expression 'same transaction'

(e) With intent to cause injury to B, A institutes a criminal proceeding against him, knowing that there is no just or lawful ground for such proceeding, and also falsely accuses B of having committed an offence, knowing that there is no just or lawful ground for such charges. A may be separately charged with, and convicted of, two offences under section 211 of the Indian Penal Code.

(f) A, with intent to cause injury to B, falsely accuses him of having committed an offence, knowing that there is no just or lawful ground for such charge. On the trial A gives false evidence against B, intending thereby to cause B to be convicted of a capital offence. A may be separately charged with and convicted of, offences under sections 211 and 194 of the Indian Penal Code.

(g) A, with six others, commits the offences of rioting, grievous hurt and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot. A may be separately charged with, and convicted of, offences under sections 147, 325 and 152 of the Indian Penal Code.

(h) A threatens B, C and D at the same time with injury to their persons with intent to cause alarm to them. A may be separately charged with, and convicted of, each of the three offences under section 506 of the Indian Penal Code.

The separate charges referred to in Illustrations (a) to (h) respectively may be tried at the same time
to sub section (2)—

(i) A wrongfully strikes B with a cane. A may be separately charged with, and convicted of offences under sections 352 and 323 of the Indian Penal Code.

(j) Several stolen sacks of corn are made over to A and B, who know they are stolen property, for the purpose of concealing them. A and B thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain pit. A and B may be separately charged with,

(7) Conspiracy to wage war, and concealing the existence of such conspiracy from the authorities—37 Cal 467

(8) Dacoity in one place, and murder of a person in another place who had found out the dacoits—4 Bom L R 789

(9) Extortion, and false personation of a public servant in order to commit that extortion—to All 58

(10) Wrongful confinement of several persons on two occasions for the same purpose, viz for extorting money—42 Cal 760

(11) Forgery, abetment of forgery and use of the forged document in a Civil Court—40 Bom 97

(12) Causing grievous hurt to a person who died of the injuries, and making false entries attributing another cause for the death of that person—14 Bom L R 41

(13) Conspiracy to commit an offence, and the commission of that offence in pursuance of that conspiracy—42 Cal 957

(14) Criminal misappropriation, and falsification of accounts in order to screen the misappropriation—40 Cal 318

(15) Rioting, causing hurt to one person in the riot, and causing hurt to another person in the same riot—39 All 623

(16) Criminal breach of trust, and falsification of accounts made to conceal the breach of trust—19 Cr L J 987 (Punjab)

(17) Illegal possession of opium, and illegal possession of cocaine for the purpose of carrying on business of selling contraband—19 Cr L J 34 (Bur)

(18) A charge of receiving stolen property can be joined with a charge of cheating, if the acts are part of the same transaction—43 Mad 41r

(19) Murder of wife and three children committed successively within a very short period of time—8 O L J 10=22 Cr L J 44

(20) Murder and causing evidence of the murder to disappear with the intention of screening the offender—25 Bom L R 231

Separate trial not illegal—This is an enabling section and not imperative. Though it provides for a joint trial of offences committed in the same transaction, yet a separate trial for each of the offences is not illegal—8 Cal 481. Thus where the accused has committed house breaking and theft, he need not necessarily be charged with both, but he may be tried for and convicted of the two offences separately—Ratanlal 307. And a conviction of one of the offences is no bar to the trial of another—26 A W N 32 12 Bom L R 276. Where it is likely that the joinder of charges will result in bewildering the accused, such joinder should not be permitted even though the offences were committed in the same transaction—1 S L R 73

varies with the circumstances of each case—1 S L R 73 No comprehensive formula of universal application can be stated to determine whether two or more acts constitute the same transaction, but circumstances which must bear on the determination of the question in an individual case can be indicated, they are proximity of time, unity or proximity of place, continuity of action and community of purpose or design—42 Cal 957, 43 Bom 147, 35 C L J 527, 1 S L R 73 The most essential tests are continuity of action and community of purpose—33 Mad 502 28 M L J 397, 19 C W N 672, 30 Bom 49, 1 Lah 562, 5 P L J 11, 43 Mad 411 The real and substantial test for determining whether several offences are so connected together as to form one and the same transaction depends upon whether they are related together in point of purpose, or as cause and effect, or as principal and subsidiary acts as to constitute one continuous action—27 Bom 135, 1918 M W N 525, 13 N L R 35, 19 Cr L J 34 (Bur)

Mere proximity of time between two acts does not necessarily constitute them as parts of the same transaction—1 L B R 361, 5 Bur L T 101 The test to be applied to find out whether a series of acts form part of the same transaction is not so much the proximity of time as the continuity of purpose or progressive action towards a single object—19 C W N, 672 1 Lah 562 2 N L R 147 13 N L R 35 and a mere interval of time between the commission of one offence and another does not necessarily import want of continuity though the length of the interval may be an important element in determining the question of the connection between the two—27 Bom 135, 1 Lah 562, 28 M L J 397 A series of acts separated by intervals are not excluded from the 'same transaction,' if the accused started together for the same goal—30 Bom 49, 14 Bom L R 972

Instances of 'same transaction' —(1) Theft of a cart from one house, and theft of two bullocks from another house in order to remove the cart—2 N L R 147

(2) Cheating by false personation, forging a letter to support the false personation and further cheating on the strength of that forged letter—11 C. W N 715

(3) Receiving stolen property and assisting to conceal that property—28 All 313

(4) Criminal breach of trust and giving false evidence to screen the breach of trust—U B R (1897 1901) 31.

(5) Theft at the same time of two bullocks belonging to two owners tied at the yoke of a cart—Ratanlal 927

(6) Rioting, and causing hurt in the riot—7 All. 29

(7) Conspiracy to wage war, and concerning the existence of such conspiracy from the authorities—37 Cal 467

(8) Dacoity in one place, and murder of 1 person in another place who had found out the dacoits—1 Bom L R 789

(9) Extortion, and false personation of a public servant in order to commit that extortion—10 All 58

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Offences requiring Sanction—If, during the course of the same transaction, several offences are committed some requiring sanction and others not, the accused can be tried for offences not requiring sanction, when no sanction has been given for the offences which require sanction—31 Mad 43

Acts not forming same transaction—(1) Kidnapping a boy and after a day or two assaulting the boy's mother who came to demand of the boy—26 Mad 454

(2) Misappropriation of money payable to a Railway Company for goods to be taken delivery of and on a different day inducing the Railway Company to deliver the goods—13 C W N 1089

(3) Criminal trespass into the house of the complainant, and assault on the complainant on a subsequent day while he was going to inform the Police of the criminal trespass—5 Bur L T 101 see also 28 M L J 397

(4) Mischief and insult caused on two different days—3 L B R 113

(5) Murder and causing evidence of murder to disappear—2 Weir 301

(6) Dishonest receipt of each stolen article is a separate offence, and such receipts of more than three of such articles (sec 234) cannot be tried together, unless the dishonest receipts were so connected as to form one transaction—9 C W N 1027

(7) Criminal misappropriation, and falsification of accounts relating to another distinct act of misappropriation—19 Cr L J 987 (Lah)

(8) Four distinct offences committed at different times at different places and against different persons cannot be tried together—18 Cr L J 739 (Pat)

(9) Forgery and giving false evidence in respect of service of summons and false evidence in respect of a service of another summons on a different occasion, cannot be said to be parts of the same transaction—10 S L R 192

(10) Five murders committed in one day, three in one village in the forenoon, and two in another village in the afternoon are not so connected together as to represent a series of acts forming the same transaction, and cannot be tried together—17 A L J 614

(11) Preparation of false balance sheet by a company for the year 1917, and preparation of another false balance sheet for the year 1918 are quite distinct and separate acts and according to no possible meaning of the word 'transaction' can it be said that the two acts form part of the same transaction—21 Bom L R 733

Section to be read subject to sec 71 I P C —(For the text of section 71 I P C see notes under sec 35 ante) Although in cases falling under this section, a joint trial of several offences may be held, still in awarding punishment Courts are to be guided by the provisions contained in sec 71 I P C. Therefore, where an offence came within two sections of the I P C the accused may be charged with and tried at one trial for two offences (subsection 2) but the punishments cannot be cumulative—Ratanlal 506, 11 B H C R 13. So also where several acts each of which would by itself constitute an offence, constitute when combined a different offence, the person accused of them may be charged with and tried at one trial for the comprehensive offence or for any one of the offences.

But it should be noted that sec 71 I P C refers only to cases falling under subsections (2) and (3) of this section, and does not provide for cases under subsection (1). Therefore, where offences are committed in the course of the same transaction (but do not fall under subsection (2) or (3)) the Court is not precluded from passing sentence on every such offence—Ratanlal 369, 10 All 58, 12 Mad 36, 7 All 414, 11 Cal 349, 12 Cal 495, but the principle of sec 71 I P C is to be followed, and the whole punishment shall not be more severe than the punishment for the gravest offence provided—2 All 101, 6 Cal 718, 2 All 644. Where two offences are so compounded together that one substantive offence can be said to have been committed, there should be only one sentence viz for the gravest offence proved, *e.g.* in cases of abduction of a child with intent on to steal from its person, and theft—7 M H C R 375, house breaking by night in order to commit theft, and theft—1 Bom 214, 23 Bom 706, Ratanlal 95, Ratanlal 79. 2 All 644, rioting and causing grievous hurt (constructively)—10 W R 63. 17 Bom 261, rioting and murder—Ratanlal 493, riding a horse furiously and causing hurt to a bystander—Ratanlal 159, house trespass with intent to commit assault, and grievous hurt—2 W R 29. In all these cases the whole punishment will be the same as that provided for the graver offence.

236 If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged

Where it is doubtful what offence has been committed

with having committed all or any of such offences, and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences.

Illustrations.

(a) A is accused of an act which may amount to theft or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating.

(b) A states on oath before the Magistrate that he saw B hit C with a club. Before the Sessions Court A states on oath that B never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false.

Application of section.—This section contemplates a state of facts constituting a *single* offence, and does not apply to cases where it is doubtful whether the act or acts involved may amount to one or other of several cognate offences—23 Cal 174. This section does not relate to *several* distinct acts, but to a *single* act or series of acts where the facts being ascertained it is doubtful which of several sections is applicable—1887 P. R 43.

Again, this section refers to *cognate* offences, such as theft and criminal breach of trust, and does not relate to offences of so distinct a character as murder and theft—8 A. W. N 95.

Nature of the doubt.—The doubt referred to in this section is a doubt of *law* and not of *facts*—4 P. L. W 40. An alternative charge can only be framed in those cases, in which the prosecution cannot establish exclusively any one offence but are able to show that the accused must have committed one of two or more offences—5 S. L. R. 16. In other words, this section applies where the *law* applicable to a certain set of facts is doubtful *i.e.* where it is doubtful which of several sections is applicable—1887 P. R 11; 1887 P. R 43, and not where the *facts* proved raise a doubt as to whether the accused is guilty of any of the charges at all—12 C. W. N 530. The Code only contemplates an alternative finding when the facts are ascertained and it would follow beyond doubt that the facts proved constitute one of two offences under one section of the Penal Code, or when the evidence proves the commission of an offence falling within one of two sections of the Penal Code, and it is doubtful which of such sections is applicable—Ratanlal 2019 N. L.

R 26, 4 P L W. 40 The alternative charge under this section is allowed not where the facts are doubtful, but when the application of the law to the fact is doubtful *viz* the section applies when it is doubtful of which of the offences charged the accused is guilty, and not when it is doubtful whether the accused is guilty of any one of the offences at all—7 N. W. P H C R 137

Therefore this section does not apply where the mind of the Judge is in doubt whether there was sufficient proof that the accused had committed the murder of the deceased or had merely caused evidence of murder to disappear, such a doubt being a doubt as to *facts*—1913 P R 11 So also the section is inapplicable where the doubt exists as to whether the accused had committed murder or culpable homicide not amounting to murder, such a doubt being based on facts only—1887 P R 11 So also, where the accused was convicted of committing dacoity in two adjoining houses, and it was doubtful as to which house he entered, an alternative charge is illegal—Ratanlal 20 Where no doubt exists as to the facts constituting the offence or as to the offences constituted by these facts, this section does not apply—18 C L J 574.

"Facts which can be proved —As already observed there must not be any doubt as to the *facts* which constitute an offence And before an alternative charge is framed, there must be a definite finding that the facts prove beyond doubt that the accused has committed some offence—1 Bur S R 374

Cumulative and alternative charges —This section authorises a Court to frame either cumulative charges or charges in the alternative, in cases of doubt mentioned in this section But it is not in every case that a charge may be framed cumulatively as well as alternatively Thus—

(1) Where an offence consists of several elements, and the doubt exists as to which of the elements must have been fulfilled by the acts of the accused, the charge should be cumulative and not alternative For instance, where it is proved beyond doubt that the accused were members of an unlawful assembly, but it is doubtful whether the common object of the accused was to commit murder or some other offence, the Court should frame different charges in respect of the two objects of the unlawful assembly, and not frame a charge in the alternative—21 Cal 955

(2) Where the offences are of a distinct character, separate charges should be framed, and not a charge in the alternative, e g offences under secs 182 and 211 I P C—1910 P R 20, or murder and theft—8 A W N 95

(3) Where the offences are of a cognate nature, *e.g.* theft and receiving stolen property, charges may be framed either cumulatively or alternatively—1889 P. R. 26. On charges under sec. 489 A (counterfeiting a currency note) and sec. 420 (cheating) the High Court directed the conviction to be in the alternative—15 A. L. J. 587.

(4) Where it is doubtful as to whether the offence was under a certain section of the Penal Code or under a section of any other law (*e.g.* Post Office Act), the charge should be cumulative. An alternative charge cannot be framed in respect of an offence under the Penal Code and an offence under a special law—5 S. L. R. 16

Contradictory statements —Illustration (b) shows that contradictory statements constitute the offence of giving false evidence, although it cannot be proved which of the two statements is false.

An alternative charge in respect of two contradictory statements can be framed only when the prosecution is unable to prove which of the two statements is false—1890 P. R. 27, 2 Weir 300. Otherwise two separate charges ought to be framed, one relating to each statement, and such evidence as is procurable should be adduced to prove the falsity of one or other of the two statements—2 Weir 299

Sentence —When the conviction is in the alternative, the Court should pass the maximum sentence provided for the lesser of the two alternative charges—15 A. L. J. 587

237. (1) If, in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

When a person is charged with one offence he can be convicted of another.

(2) (*Omitted*)

Illustration

A is charged with theft, it appears that he committed the offence of criminal breach of trust or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be), though he was not charged with such offence.

Change —Subsection (2) of the old section has been omitted by sec 63 of the Criminal Procedure Code Amendment Act 1923. This subsection ran as follows —' (2) When the accused is charged with an offence, he may be convicted of having attempted to commit that offence although the attempt is not separately charged '.

It should be noted that this subsection, though omitted from this section has been re enacted as subsection (2A) of section 238 as it should be more appropriately placed under that section.

Scope of Section —Section 237 has to be read with section 236. It applies to cases where sec 236 applies. If the facts of the case do not fall under sec 236, sec 237 has got no application—18 C W N 1276, 48 C L J 574. It is an enabling section which empowers the Court to convict the accused of offences for which no charge has been framed but for which a charge could have been framed under sec 236—4 P L W 40.

Conviction for different offences —A person charged and tried under sec 411 I P C (receiving stolen property) may be convicted of an offence under sec 379 I P C (theft)—8 A W N 116. Similarly a person charged with theft may be convicted of receiving stolen property—17 M L J 219. A person charged with criminal breach of trust may be convicted of attempting to cheat—12 B H C R 1.

But the two offences (i.e. the offence charged and the offence of which the accused is convicted) must be *cognate* offences. Secs 236 and 237 refer to cognate offences such as theft and criminal breach of trust, and do not relate to offences of so distinct a nature as murder and theft—8 A W N 95. Thus a person charged with rape cannot be convicted of kidnapping, since the two offences involve different elements and different questions of fact—8 Bom L R 120. Persons charged with dacoity cannot be convicted of receiving stolen property—Rantanlal 34. A person charged with dacoity and riot cannot be convicted for house trespass—23 W R 59.

A person who is charged under secs 149 and 325 I P C of having constructively committed the offence of causing grievous hurt, by being a member of an unlawful assembly, cannot be convicted under sec 325 I P C of causing grievous hurt with his own hands—34 Cal 698.

Alteration of charge necessary —When a person is charged with one offence and is convicted of a different offence, the Court should alter the charge under sec 227 of this Code before conviction. Sec 237 does not imply that a person charged under one section of the I P C may be convicted under another section, without altering the charge—8 A W N 416.

Power of Appellate Court :—An appellate Court has power to convict the accused for an offence, though he was not charged and tried for that offence in the original Court—26 Cal. 863 ; 41 Cal. 537. And the Appellate Court can do so not only under this section but also under sec. 423 (b) (2)—(1916) 2 M. W. N. 267.

238. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

(2A) *When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.*

(3) Nothing in this section shall be deemed to authorize a conviction of any offence referred to in Section 198 or Section 199 when no complaint has been made as required by that section.

Illustrations.

(a) A is charged, under Section 407 of the Indian Penal Code, with criminal breach of trust in respect of property entrusted to him as a carrier. It appears that he did commit criminal breach of trust under Section 406 in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under Section 406.

(b) A is charged, under Section 325 of the Indian Penal Code, with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under Section 335 of the Code.

Change.—By section 64 of the Criminal Procedure Code Amendment Act, sub section (2) of section 237 has been transferred to the present section and has been re enacted as subsection (2 A), it being more appropriate under this section than under section 237.

Principle of section—Where an offence consists of several particulars, a combination of some only of which constitutes a complete minor offence, the graver charge gives notice to the accused of all the circumstances going to constitute the minor offence of which he may be convicted. The latter is arrived at by mere subtraction from the former. But when the circumstances constituting the major charge do not necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also, the principle no longer applies, because notice of the former does not necessarily involve notice of all that constitutes the latter—11 B II C R 242.

Though a Magistrate has power under this section to convict the accused of a different offence from what he was originally accused of, still this must be done in cases where the accused is not in any way prejudiced by the conviction on the new charge. The accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him, and unless he has this knowledge, he must be seriously prejudiced in his defence—3 P L T. 322.

"Minor offence"—Minor offence is not defined anywhere in the Code and should be understood in its ordinary and not in any technical sense—22 Cal 1006. It means an offence deserving a lesser degree of punishment.

This section enables a Court to convict a person of a minor offence, although he was charged with a major offence, but it does not enable a Court to do the contrary, i.e. to convict on a major offence, when the accused was charged with a minor one—1 Bom L R 513.

Cases under this section—An offence under section 365 I P. C. can be said to be a minor offence as compared with secs. 366 and 376 I P. C., and a person charged under the latter sections can be convicted of the offence under the former section (365 I. P. C.) even though he was not charged with it—22 Cal 1006. A person charged with dacoity may be convicted of theft, though he was charged with dacoity and not with theft—17 Bom. 369. A person charged with an offence under sec. 457 can be convicted of an offence under sec 414 I. P C., since the latter offence is included in the former—Rantanlal 293.

Where the graver offence of rioting was not proved, the Magistrate was competent to try the accused for the lesser offence of assault—7 Mad. 454. Where the accused is charged with offences under secs 304

and 325 I P C, he may be convicted under sec 323 I P C—34 Cal 325 An offence under sec 211 I P C includes an offence under sec 182 I P C, and therefore it is competent for the Magistrate to convict under sec 182, though the accused may be charged under sec 211 I P C—8 S L R 179 A person charged under section 457 I P C can be convicted of an offence under sec 456 I P C—44 Cal 358 Where the common object of an unlawful assembly is to commit criminal trespass, a person charged under section 147 I P C for being a member of an unlawful assembly, can be convicted under sec 447 I P C (criminal trespass), because the latter offence is a minor offence included in the former—18 C W N 992

In the trial of an accused by a Sessions Judge with the aid of assessors for an offence so triable, it is competent to the Judge to convict the accused of a minor offence though that offence is triable only by a jury—45 Bom 619

Cases not under this section —A charge under sec 376 I P C cannot be altered into a conviction under Sec 366 I P C because the two sections involve different elements and different questions of fact—8 Bom L R 120, and the latter cannot be said to be minor to or included in the former Similarly, where the accused was charged with murder but the evidence disclosed an offence of kidnapping from lawful guardianship a conviction for the latter offence could not be sustained since it was neither minor to nor included in the former offence—2 We r 302 An offence under Sec 202 I P C is not a minor offence included in the offence under Sec 201 I P C and therefore a conviction for the former offence cannot be had where the charge was under the latter section only—5 S L R 123 A person charged with dacoity and riot cannot be convicted for house trespass, the latter offence not being a part of the former—23 W R 59 A person charged with robbery cannot be convicted of housebreaking by night and theft in a dwelling house because all the particulars constituting the latter offences are not included in the definition of the robbery with which the accused was charged—Ramanlal 211

Rioting and hurt etc —Where the accused were charged with rioting they could not be convicted of criminal trespass and hurt because none of the latter offences was a necessary ingredient of the offence of rioting and it was not proved that the common object of rioting was criminal trespass or hurt—18 Cr L J 860 (Mad) Where the accused is charged with being a member of an unlawful assembly and with committing grievous hurt by implication (secs 149 and 325 I P C) he cannot be convicted of the offence of causing grievous hurt under sec 325 by himself and a dual act because under no reasonable construction of this section

can the substantive offence of causing grievous hurt individually be regarded as minor to or included in the charge under secs 325 and 149 I. P. C. of causing grievous hurt by implication—34 Cal. 698 ; 41 Cal 662 ; 34 Cal 325 ; 16 C. W. N 1077 *Contra*—5 Cal 871

Subsection (2A)—Attempt—Under this subsection when an accused is charged with an offence he may be convicted of having attempted to commit that offence, although the attempt was not separately charged—1 P. L. J. 391.

Abetment.—There is a conflict of opinion as to whether a person charged with a substantive offence can be convicted of abetment of that offence In 33 Mad 264, 21 Cr. L. J. 44 (Pat), 22 Cr. L. J. 311, (1922) M. W. N 182, and 11 B. H. C. R. 240, it has been held that it is improper for a Court to find a man guilty of the abetment of an offence, on a charge of the substantive offence only, because when a man is accused of a substantive offence, he may not be conscious that he will have to meet an imputation of collateral circumstances constituting an abetment of it, which may be quite distinct from the circumstances consisting the substantive offence itself A charge for the substantive offence as such gives no intimation of a trial to be held for the abetment But in 23 M. L. J. 722, it was laid down that if on the facts charged two charges could be framed, *viz* the commission of the principal offence and the abetment thereof, the accused could be convicted of the offence of abetment, though it was not separately charged against him

An accused may be *convicted of a substantive offence* though he was *charged only with abetment* of that offence ; see 1912 P. W. R. 17

Subsection (3)—When minor offence requires complaint—See subsection (3) A person charged with one offence cannot be convicted of a minor offence, if the minor offence requires a complaint by a particular person mentioned in secs 198 and 199 Thus, the offence of adultery requires complaint by the husband, and therefore a person charged with rape cannot be convicted of adultery, in the absence of a complaint by the husband Even the husband's giving evidence will not amount to a complaint—5 All 233 See notes under sec 199 as to what constitutes a complaint by the husband

Power of High Court to Convict—Where the jury acquitted the prisoners of certain offences and found some other facts upon which the jury could have convicted them of some other offence, but did not convict, the High Court has power to convict the prisoners of the latter offence—3 Cal. 189

What persons may be charged jointly.

239 *The following persons may be charged and tried together, namely —*

(a) *persons accused of the same offence committed in the course of the same transaction,*

(b) *persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence,*

(c) *persons accused of more than one offence of the same kind within the meaning of Section 234 committed by them jointly within the period of twelve months,*

(d) *persons accused of different offences committed in the course of the same transaction,*

(e) *persons accused of an offence which includes theft extortion or criminal misappropriation and persons accused of receiving or retaining or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first named persons or of abetment of or attempting to commit any such last named offence*

(f) *persons accused of offences under Sections 411 and 414 of the Indian Penal Code or either of those sections in respect of stolen property the possession of which has been transferred by one offence, and*

(g) *persons accused of any offence under Chapter XII of the Indian Penal Code relating to counterfeit coin, and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence,*

and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges

Illustrations

(a) A and B are accused of the same murder A and B may be charged and tried together for the murder

(b) A and B are accused of robbery, in the course of which A commits a murder with which B has nothing to do A and B may be tried together on a charge, charging both of them with the robbery, and A alone with the murder

(c) A and B are both charged with a theft, and B is charged with two other thefts committed by him in the course of the same transaction. A and B may be both tried together on a charge, charging both with the one theft, and B alone with the two other thefts.

Change—This section has been thoroughly redrafted by sec. 65 of the Criminal Procedure Code Amendment Act, 1923. Under the old law this section stood as follows:—“When more persons than one are accused of the same offence or of different offences committed in the same transaction or when one person is accused of committing any offence, and another of abetment of or attempt to commit such offence, they may be charged and tried together or separately, as the Court thinks fit and the provisions contained in the former part of this chapter shall apply to all such charges.”

The actual change brought about by this amendment is the addition of clauses (c) (e) (f) and (g). It is provided that when two or more persons are accused of offences of the same kind committed by them jointly during the space of one year, they may be tried for the same at one trial. *Secondly*, it is directed that when one person is accused of any offence which includes theft, etc. and another of receiving, or retaining or disposing of the stolen property, they may be tried jointly. *Thirdly*, provision is made for the joint trial of one person accused of counterfeit ing coin and another of fraudulently possessing or uttering it. *Fourthly*, another clause has been added dealing with offences under secs 411 and 414 of the Indian Penal Code.—*Statement of Objects and Reasons* (1914).

Object of section—This section lays down certain general principles for the combination of charges in a joint trial of several persons. The object of these principles is to avoid the likelihood of bewildering the accused in their defence by having to meet many disconnected charges and of endangering the prospect of a fair trial by the production of a mass of evidence directed to many matters and tending, by its mere accumulation to induce an undue suspicion against the accused persons.—19 A L J 392.

Scope and application—This is the last exception to sec. 233 which lays down the general principle that every offence must be charged and tried separately. This is the only section which authorises a joint trial of *several* persons under circumstances specified in this section. Except in cases falling under this section, a joint trial of several accused renders the trial invalid—4 N L R 71, and a misjoinder thus taking

place is not a mere irregularity which can be cured by the provisions of sec 537—15 Cr L J 420 (Oudh), or by any waiver or consent of parties or their pleaders—6 Cal 96

This section applies to *trials* and not to *inquiries*. The sections of the Cr P. C. relating to joinder of charges viz 233 to 239 refer to trial of the accused and cannot be extended to preliminary enquiries held by Magistrates prior to commitment to the Sessions—26 Mad 59. Therefore in a joint commitment of several accused, it is not necessary that the conditions of this section should be fulfilled—42 Mad 561.

But this section is applicable to inquiries under Chapter VIII. The main principles applicable to a criminal trial regarding joinder of charges and the joint trial of accused persons are also applicable to inquiries under Chapter VIII—8 C. W. N. 180; 14 Cal 358, 9 All 452, 6 All 214, Ratanlal 585, Ratanlal 556.

Again, this section does not apply to trials of cross cases. The trial of the accused in the two cross cases ought to be separate. But a simultaneous trial is not altogether invalid but somewhat irregular—8 C. W. N. 344, 13 C. L. R. 275. See notes at the end of section 233 under heading "Counter cases."

Clauss (a)—"Persons accused of the same offence"—The words 'same offence' imply that both the accused should have acted in concert or association, and therefore where the allegation was that *either* one or the other committed the crime, this section does not apply and the two accused must be tried separately according to sec 233—7 L. B. R. 68. Where it is merely shown that part of the stolen property was found in the possession of one person, and another part was found in the possession of another, it would probably be illegal to try the two men together, but if the two men were acting in concert and were in joint control of the stolen property it was held that their joint trial would not be illegal—1 P. L. J. 64. Unless the receiving of stolen property is joint, persons cannot be tried jointly under this section for receiving stolen property, merely because the goods were stolen in one theft—17 Cr. I. J. 477 (All).

'Same offence'—These words signify one and the same physical act of crime and not different acts constituting crimes called by the same name or punishable under the same section. When A and B give false evidence in the same judicial proceeding, even though they depose in the same day regarding the same matter and in almost the same words they do not commit the same offence, but different offences, which can not be tried together unless they were committed by them in the same transaction—13 N. L. R. 35. See also 2 Weir 271, 1 B. R. (1872 1873) 129, 2 Weir 304.

Clause (b)—Abetment —A person charged with a substantive offence can be tried jointly with a person charged with abetment thereof. Thus, were a person who had a license^a for the sale of opium allowed another who had no such license to sell it, they could be jointly tried, the offence of the former being an abetment of the offence of the latter—1906 P. L. R. 113. A licensed vendor is punishable under sec 50 of the Bengal Excise Act for the acts of the servant, in such a case, the master is said to be an abettor of the servant by implication, and both may be tried together—15 C. L. J. 692. When a person is charged with kidnapping, and three others with having abetted that offence at different places, all the four persons can be tried jointly at the place where the principal offence was committed—18 All. 350.

Clause (c)—Offences of the same kind —Section 234 applies only to the case of *one* accused committing several offences of the same kind with a year. But where *several* persons committed several offences of the same kind, there was no provision under the old law for the joint trial of those persons, and consequently separate trial was necessary—11 C. W. N. 32. Thus it was held that where three dacoities were committed by several dacoits on three different dates and at separate places the dacoits must be separately charged and tried for each dacoity as the offences were not committed in the same transaction—19 A. L. J. 796. So again, three acts of robbery committed by several persons on the same night in three distinct places must be tried separately—6 W. R. 83. Where several persons looted the linseed crop of the complainant one day and his tobacco crop on another day the offences must be tried separately as they were not parts of the same transaction—33 Cal. 292. These cases are now overruled by this clause. Under the present law, the offences can be tried together, provided that each offence is committed by the accused persons *jointly*, and it is not necessary that all the sets of offences must be committed in the same transaction. If the offences are not *joint* this section cannot apply, thus where three persons were found to be in possession of stolen articles but none of the articles were in their *joint possession*, they cannot be tried jointly even though the articles were the proceeds of one burglary—19 A. L. J. 815, 20 A. L. J. 563.

The joint trial of two persons for passing counterfeit coins to three persons on the same date is valid under this subsection—44 M. L. J. 130.

Clause (d)—Distinct offences committed in same transaction —For the meaning of the words 'same transaction' see notes under section 235.

place is not a mere irregularity which can be cured by the provisions of sec 537—15 Cr L J 420 (Oudh), or by any waiver or consent of parties or their pleaders—6 Cal 96

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Clause (a)—"Persons accused of the same offence"—The words 'same offence' imply that both the accused should have acted in concert or association, and therefore where the allegation was that *either* one or the other committed the crime, this section does not apply and the two accused must be tried separately according to sec 233—7 L B R 68. Where it is merely shown that part of the stolen property was found in the possession of one person, and another part was found in the possession of another, it would probably be illegal to try the two men together, but if the two men were acting in concert and were in joint control of the stolen property it was held that their joint trial would not be illegal—1 P. L J 64. Unless the receiving of stolen property is joint, persons cannot be tried jointly under this section for receiving stolen property, merely because the goods were stolen in one theft—17 Cr L J 477 (All)

'Same offences'—These words signify one and the same physical act of crime and not different acts constituting crimes called by the same name or punishable under the same section. When A and B give false evidence in the same judicial proceeding, even though they depose in the same day regarding the same matter and in almost the same words they do not commit the same offence, but different offences, which can not be tried together unless they were committed by them in the same transaction—13 N L R 35. See also 2 Weir 271, L B R (1872 1873) 129, 2 Weir 304

(3) The offence of keeping a gaming house and the offence of playing therein arise out of facts so inseparably connected together as to form one transaction, and therefore the keeper and the players are clearly within the purview of this section as persons accused of different offences committed in the same transaction—9 N L R 68, 1919 P R 6, 20 Cr L J 768 (Pat), 20 A L J 967 *Contra*—1914 P R 35 and 1910 P W R 5 where it has been held that the two offences cannot be said to be part of the same transaction

(4) If several accused carry out a systematic scheme of criminal breach of trust, by successive acts done at intervals, each accused alternately taking the benefits, the unity of the project constitutes the acts as parts of one transaction, and all the accused can therefore be jointly tried—30 Bom 49

(5) Charges of murder against three accused, and an alternative charge against one of them for murder or causing disappearance of evidence of murder, can be jointly tried—1 S L R 73 25 Bom L R 231 *Contra*—8 All 252

(6) Where several persons were members of a secret society and conspired to wage war or deprive the King of the sovereignty of British India and collected arms and ammunitions for that purpose and actually waged war, it was held that the joint trial of all the accused for offences under sections 121, 121A, 122, 123 I P C were legal—37 Cal 467, and so long as the conspiracy continues, the transaction which began with the forming of the common intention continues—19 C W N 706

(7) Where illegal gratification is paid to a person through another, the joint trial of both persons for offences under Secs 161 and 162 I P C is valid—7 Bom L R 637.

(8) Where several persons were entrusted with a sum of money and those persons in collusion committed criminal breach of trust or dishonestly misappropriated the amount, they could be jointly tried—17 Cr L J 30 (Mad)

(9) Cheating by A in respect of a certain sum collected from several persons on a certain date, and cheating by B in respect of another sum collected from other persons at the same time and at the same place and in pursuance of the same conspiracy are parts of the same transaction, and A and B may be tried together—29 C L J 31 So also conspiracy and acts of cheating in pursuance of that conspiracy can be tried together—49 Cal 573

(10) Dacoity and several offences committed in the course of the dacoity—20 A L J 926

To enable the Court to try at one trial several persons for several distinct offences, the offences must form part of the same transaction—7 L B R 272, this section does not apply to charges against several persons accused of several offences unless the acts constituting the offences form the same transaction—33 Cal 292, 9 C W N 1027, 13 N L R 35, 20 Cr L J 7

It is also necessary that the accused must be *associated* together in the perpetration of the acts forming the same transaction from start to finish—29 Bom 449 30 Bom 49, 1917 P R 17 But it is not necessary that all the persons must be charged with all the offences See illustrations (b) and (c) If the accused started together for the same goal, this suffices to justify the joint trial, even if incidentally one of them has done an act for which the other may not be responsible—30 Bom 49, 5 P L J 11 The foundation for the procedure laid down in this section is the association of two persons concurring from start to finish to attain the same end Community of purpose or design and continuity of action are the essential elements of the connection necessary to link together different acts into one and the same transaction In such cases the acts alleged to be connected with each other must have been done in pursuance of a particular end in view and as accessory thereto—5 P. L. J 11 1 P L T 564

Charge need not specify same transaction —It suffices for the purpose of a joint trial that the accusation alleges the offences committed by each accused to have been committed in the same transaction with the meaning of this section It is not necessary that the charge should contain a statement as to the transaction being one and the same It is the tenor of the accusation and not the wording of the charge that must be considered as the test—30 Bom 49

Examples of offences committed in the same transaction —

(1) Criminal breach of trust by one person and receipt by another of the stolen property (the proceeds of the breach of trust) knowing it to be so—6 Bom L R 517 In such a case it is not necessary that the offence of receiving should take place simultaneously with the offence of criminal breach of trust *Ibid*

(2) Where one set of accused were members of an unlawful assembly with the common object of setting fire to buildings, and another accused was a member of an unlawful assembly with the object of forcibly closing a college it was held that the proceedings of the mob consisting of several minor transactions from first to last showed a continuity of purpose and action as to form one transaction and all the rioters could be tried at one trial—6 M L T 17

(12) Murder by one person and intentional omission by another person who discovered the murder to give information in respect of the murder cannot be said to be offences in the same transaction—19 A. L. J. 915

Clause (e) —Under the old law it was held that where A and B were charged with house breaking by night with intent to commit theft and C with having received some of the stolen articles on a certain day and D with having received some other stolen articles on another day, the joint trial of those persons would be illegal—2 A. W. N. 215. This ruling is now superseded by clause (e) of this section

Where one person committed *theft* and the other person *received the stolen property* knowing it to be stolen, they can be tried jointly—6 C. L. R. 245, 38 All 311, 6 Bom. L. R. 361, 44 All 276, 1 C. W. N. 35; 28 Cal 10, and it is not necessary that the receiving should take place simultaneously with the theft—44 All 276. Even an appreciable interval of time between the two acts which are otherwise connected does not always prevent them from being parts of the same series of connected events and from being tried together—14 Bur. L. R. 38; 2 L. B. R. 19. In 29 Bom 449 and 21 C. W. N. 1111, however, it is held that theft and receipt of stolen goods cannot be said to be acts committed in the same transaction, because the thief and the receiver of goods are not associated in the series of acts which form the same transaction from the very start, the one offence takes place after the other is completed. In another Calcutta case also it was held that unless the theft and subsequent receipt were committed in pursuance of the same conspiracy the two offences could not be said to be parts of the same transaction and the offenders could not be tried together—23 C. W. N. 463. Under the present clause, however, it is not necessary that the two offences must be committed in the same transaction or in pursuance of the same conspiracy, all that is now required is that one offender should commit theft and the other offender should receive the stolen property

Dacoity, and receiving the property stolen in the dacoity may be tried together under this clause—20 A. L. J. 98r

Clause (f) —By this clause, the rulings in 28 Cal 104 and 49 Cal 555 are rendered obsolete

Clause (g) —A person who passes counterfeit coins and another in possession of them can be tried jointly—31 Cal 1007.

Joint trial —A joint trial is not compulsory under this section; the Magistrate has a discretion to proceed jointly or *separately* against the accused persons—16 N. L. R. 9. Although a joint trial is allowed under the circumstances specified in this section, still it is the duty of the Magistrate to see that the accused are not prejudiced thereby. No

joinder of charges should be allowed if it bewilders any of the accused in his defence or unduly prejudices him—1 S L R 73; 5 Mad 20. If the accused appear to have acted independently and have separate defences, the joint trial is illegal—2 Weir 303.

Applicability of sec 234 to sec. 239—The last words of this section viz "the provisions of the former part of this chapter shall apply to all such charges" have been construed in 7 L B R 272 to mean that the part of the chapter headed "frame of charge" (Secs. 221—232) shall apply to this section. But in 11 A L J 188, it was held that the words mean that secs 234, 235 shall also apply to this section. Sec. 239 is governed by sec. 234 and sec. 235, see notes under sec. 234.

Illegality not cured by acquittal—Where several persons were charged with and tried at one trial for dacoity, and one of these persons was also tried for an offence under sec 20, Arms Act, for being in possession of arms and ammunitions at a time subsequent to the dacoity and after the transaction in which the dacoity was committed, it was held that the trial was illegal and the fact that the Sessions Court acquitted him of the offence under the Arms Act observing that the accused could not be legally convicted at the same trial of the offences under the Arms Act, could not cure the illegality—1917 P R 44.

240 When a charge containing more heads than one is framed against the same person, and when a conviction has been had on one or more of them, the complainant, or the officer conducting the prosecution, may, with the consent of the Court, withdraw the remaining charge or charges, or the Court of its own accord may stay the inquiry into, or trial of, such charge or charges. Such withdrawal shall have the effect of an acquittal on such charge or charges, unless the conviction be set aside, in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed with the inquiry into or trial of the charge or charges so withdrawn.

Scope of section—This section applies where the accused is charged with several distinct *offences* and not where formal *charges* are drawn up against him—1887 P. R. 24. Where the offence is *one*, but the charges are several because the offence falls under several sections of the A. P. C. or because there is doubt as to which offence was committed,

it is so found and apply, and the conviction of the accused on one of the charges necessarily makes the other charges nugatory.

If however the accused has committed several offences, and several charges are therefore drawn up, the conviction on one of the charges does not make the other charges nugatory, but it is open to a Court to convict the accused on the other charges or to withdraw the charges under this section—1853 P. R. 24. This is an enabling section and gives the Court discretion either to convict or acquit the accused on the remaining charges, and does not make it obligatory on the prosecution, on a conviction of one charge to withdraw the other charges.

If the evidence is sufficient to sustain a conviction on all the charges, and the Court considers a certain term of imprisonment adequate to meet the offence under each head, it is not a proper course for the Court to convict on one charge and drop the others, but it should convict on all charges and pass concurrent sentences—Ratanlal 19, Ratanlal 255.

Again, this section applies only to charges framed in the *same case*; and the prosecution cannot, on conviction of the accused in one case, withdraw a charge against the accused in *another case*—Ratanlal 262; Ratanlal 977.

Charge when can be withdrawn—A charge can be withdrawn any time before it is tried. If, however, evidence on the charge is recorded and the pleaders heard, it cannot be withdrawn, and it is the duty of the Judge to sum up the whole of the evidence and to require the jury to return a verdict on the charge—Ratanlal 268. *As further*, a charge cannot be withdrawn after a jury has returned a verdict convicting the accused on that charge—Ratanlal 258.

High Court's power to direct withdrawal—Where the accused was charged with 10 offences of criminal breach of trust, in respect of 10 small sums, and the Sessions Judge convicted the accused on three only of the charges, the High Court on appeal approved of the Sessions Judge's action, and also directed that no further proceedings against the accused in respect of the other offences should be taken—9 C. L. J. 257.

CHAPTER XX.

OF THE TRIAL OF SUMMONS-CASES BY MAGISTRATES

This chapter deals only with the trial of summons-cases ; a warrant case cannot be tried under this chapter—7 Mad 454 If however a warrant case is joined with a summons case, e.g. where two charges arising out of the same transaction are made against an accused person, one of which is a summons-case and the other a warrant case, the procedure should be as in a warrant case—11 Cal. 91 ; 39 Mad. 503 ; 41 Mad 727 But in such a case if the warrant case is not proved, the Magistrate may proceed with the summons case according to the procedure laid down in this chapter and not under chapter XXI—7 Mad 454

241. The following procedure shall be observed by Magistrates in the trial of summons-cases.

242. When the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted ; but it shall not be necessary to frame a formal charge

Particulars to be stated to accused —It is necessary that the accused should have a clear statement made to him (a) that he is about to be put on his trial ; and (b) as to the offence or facts constituting the offence of the commission of which he is accused. If these particulars are not made known to him, the conviction will be set aside—3 C. L. R 87.

Charge —Although it is not necessary to frame a formal charge in a summons-case, still the provisions of section 233 as to joinder of charges apply to summons cases as well, because a charge is an essential element in any trial—3 L. B. R. 52 See also 41 Cal. 694 cited under sec 233

Joint trial of summons and warrant cases —*Necessity of charge* .—As observed in the preliminary notes to this chapter above, when a summons case is tried jointly with a warrant case, the procedure of a warrant case has to be followed, and a charge has to be drawn up not

only for the warrant case but for the summons case also. Where therefore the accused was summoned for offences under secs 143 and 379 I P C, but only a charge for an offence under sec 379 I P C was drawn up, a conviction under sec 143 was set aside for the absence of a charge—29 Cal 481

243 If the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as possible in the words used by him, and, if he shows no sufficient cause why he should not be convicted the Magistrate *may* convict him accordingly.

Conviction on admission of truth of accusation

Change —The word 'may' have been substituted for the word 'shall,' by sec. 66 of the Criminal Procedure Code Amendment Act, 1923. The reason is stated below

Admission to be recorded in the words used —The Legislature requires that the admission shall be recorded as nearly as possible in the words used by the accused, because the right of appeal depends upon whether he really pleaded guilty or not—9 A W N 81. When an accused person makes an exculpatory statement before the framing of a charge, the Magistrate should take down the plea of guilty in the form of question and answer, and in the exact words used by the accused in answer to the charge—5 Bom L R 999

Time of recording —The admission of the accused should be recorded at once, at the time of the trial, and, not afterwards from the rough notes nor from the Magistrate's memory—15 Mad 83

Written defence —Where a written defence is tendered in a case under this chapter, it is not incumbent on the Magistrate to take down the defence of the accused by personally examining him—16 W R 53, 1890 P R 2

'May convict' —Under the old law the words were "*shall* convict" and therefore the Magistrate was *bound* to convict the accused if the latter pleaded guilty and there was nothing to show that the plea was not unreserved or voluntary—8 S L R 213. If the accused pleaded guilty the Magistrate was bound to convict him and pass a sentence though a nominal one, he had no power to discharge the accused on the ground that his criminal intention was wanting—U B R (1905) Cr P. C 37

This power is now given to the Magistrate by the present amendment. "This amendment gives the Magistrate a discretion, which he does not now possess, as to convicting an accused who pleads guilty to a summons

case, and the Court is thus able to refuse to accept a plea of guilty which it believes to be untrue"—*Statement of Objects and Reasons* (1914). By making this amendment, the Legislature has reverted to the wording of the 1872 Code.

244. (1) *If the Magistrate does not convict the accused under the preceding section or, if the accused does not make such admission the Magistrate shall proceed to hear the complainant (if any), and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence.*

Procedure when no such admission is made.

Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.

(2) The Magistrate may, if he thinks fit, on the application of the complainant or accused, issue process to compel the attendance of any witness or the production of any document or other thing.

(2) The Magistrate, may, if he thinks fit, on the application of the complainant or accused, issue a summons to any witness directing him to attend or to produce any document or other thing.

(3) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses, incurred in attending for the purposes of the trial, be deposited in Court.

Change—This section has been amended by section 67 of Criminal Procedure Code Amendment Act, 1923.

The italicised words at the beginning of the section have been added as consequential to the amendment made in sec. 243. The proviso has been introduced "to provide for the case where a complaint has been made by a Court, and we have made a similar amendment in section 252"—*Report of the Joint Committee* (1922). In subsection (2) the word 'summons' has been substituted for "process" ; for reasons see below.

Magistrates duty to examine complainant, witnesses etc.—The Magistrate is not at liberty to stop a case whenever he likes. If the accused does not make the admission under sec. 243, the Magistrate is bound to hear the complainant and his witnesses, and he is not competent to acquit the accused without examining them—*Ratanlal* 539 ; 2 B.

L. R. S. N. 15, 18 All 221, 6 W. R. 75 It is not sufficient to examine the complainant alone, if the complainant has any witnesses, they must also be examined—5 Mad 160, and the Magistrate is not entitled to acquit the accused on a consideration of the complainant's statement alone—20 Mad 388

Again, it is *prima facie* the duty of the prosecution to call the witnesses who prove the connection with the transaction in question and who from the connection must be able to give important information—8 Cal 121, 10 Cal 1070 All persons said to have witnessed the offence should be produced before the Magistrate—1916 P. R. 12 If such witnesses are not called, an adverse inference against the prosecution may be drawn—8 Cal 121

Moreover the Magistrate is bound to examine the accused and his witnesses—6 W. R. 75 He is bound to examine *all* the witnesses that are produced by the accused, and has no discretion in this matter—13 W. R. 63 The Magistrate has no power to limit the number of witnesses to be examined, though he has undoubted jurisdiction to curtail the number of *unnecessary* witnesses on the ground that their examination will delay and probably defeat the ends of justice—2 P. L. T. 330. If the Magistrate refuses to examine any witness tendered by the accused, the conviction is illegal—12 W. R. 77 It is also the duty of the Magistrate to enquire of the accused as to whether he has any witness to produce. Where on such enquiry is made, the conviction is liable to be set aside—1884 P. R. 7 If the accused does not produce any witness, no unfavourable inference will be drawn against him—8 Cal 121 But see 21 C. W. N. 1152 (cited under sec 290)

The Magistrate must base his decision on the evidence produced on either side in Court, he cannot rely on statements made to him out of Court—14 Bom 572

Issue of summons—If the complainant or the accused thinks that any witness is not likely to appear without summons, he should apply beforehand to the Magistrate for summons to enforce his attendance—14 W. R. 76 When such application is made, the Magistrate must either grant or refuse the application, he cannot simply 'file' it—6 C. W. N. 548

The Magistrate has a discretion as to whether he will issue summons or not—14 W. R. 76 Where a complainant mentioned the names of several witnesses but could only produce two of them, the Magistrate could decide the case on the evidence of the two witnesses alone, 15 W. R. 87, and was not bound to issue summons to the other witnesses—4 M. H. C. R. App 29

admitted or proved he appears to have committed, whatever may be the nature of the complaint or summons.

This section enables the Magistrate to proceed in regard to any other offence, *prima facie* established by the evidence for the prosecution. But if the Magistrate intends to do so, he must act in accordance with the provisions of sec. 242 and must explain to the accused the particulars of the offence for which he is to be tried—22 W. R. 40 But it is not necessary, when the Magistrate thinks that other offences have been committed, to reopen the trial or to follow the procedure of secs 243 and 244. Such a procedure would involve the rehearing of all the evidence in the same trial and is clearly opposed to the intention of the Legislature—36 Cal. 869

This section does not mean that the accused in a summons case can be convicted of an offence alleged to have been committed on a date to which no reference has been made in the complaint or summons—22 Cr. L. J. 559 (Cal)

247. If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day :

Provided that, where the complainant is a public servant and his personal attendance is not required, the Magistrate may dispense with his attendance, and proceed with the case.

This section does not apply to cases instituted under section 195, and the Magistrate cannot dismiss the complaint for default of the complainant to appear—Ratanlal 137. See proviso

'Does not appear'—The appearance of the complainant's Vakil is not appearance of the complainant within the meaning of this section, unless the Court has dispensed with his personal attendance and has specially allowed him to appear by a pleader—2 Weir 309

* If the complainant does not appear, the Court is not bound to wait for the complainant till the Court closes for the day—7 Mad 356 The Magistrate is empowered to dismiss the complaint if the complainant

does not appear when the case is called on for hearing even though he appeared soon after—7 Mad 213

Although a Magistrate has power to dismiss the complaint for default of the complainant's appearance, he should exercise his power with a reasonable discretion. He should not dismiss the complaint where the non appearance of the complainant was due to circumstances beyond his control, *e. g.* a heavy flood which cut off all communications—24 W. R. 64, 5 W. R. 51; or when the case was transferred from one Magistrate to another, and the complainant was present in the Court premises, but not having had notice of the transfer did not appear before the particular Magistrate who had charge of the case, but appeared in the previous Court—13 C. L. R. 303, 47 Cal. 147, 24 C. L. J. 444, or where both parties were absent, the absence of the accused being due to non service of summons—2 Weir 307, or where the case was called on for hearing on a date not fixed for hearing and the complainant was necessarily absent—18 C. W. N. 1180, or where the complainant was dead and another person wished to be brought on the record—18 C. W. N. 1211 (*contra*—19 C. W. N. 334), or where the complainant was in jail and could not therefore appear—Ratanlal 59

Non appearance on adjourned hearing—A Magistrate can dismiss a complaint and acquit the accused, not only where the complainant does not appear on the first day of hearing but also where he fails to appear on the date of adjourned hearing—2 Weir 308, 22 W. R. 40; 18 C. W. N. 584. But this power to dismiss a complaint must be exercised with discretion. Where the complainant has done all that is necessary for him to do to establish his case, a complaint ought not to be dismissed for his non appearance on an adjourned date, unless his attendance is in the opinion of the Magistrate specially required on that day—2 Weir 306, 29 C. L. J. 387.

Again, a Magistrate cannot dismiss a complaint for non appearance of the complainant on the adjourned date, if the order of adjournment was not made in the presence and hearing of parties—8 M. H. C. R. App. 5, or where a case was adjourned *sine die*—16 W. R. 58, or where the Magistrate did not specify the place where the case was to be taken up, but ordered the parties to appear 'either at Aligarh or at Talibnagar'—2 A. W. N. 229

Non appearance on date of judgment—This section applies to a case of absence of the complainant on the date fixed for his appearance or on the date of adjourned hearing and does not apply to a case where the complainant is absent on the date fixed for delivery of the judgment. If on such a date the complainant is absent (and the attendance of the complainant on that date was not specially directed by the Magistrate) no

order of acquittal of the accused on the ground of absence of the complainant is erroneous—29 C L J 387, 6 N. L J 68

Order of Acquittal —In a summons case, if the complainant is absent on the day of hearing, the proper order to be passed by the Magistrate under sec. 247 is one of acquittal and not one 'striking off' the complaint—10 Bom L R 628

Warrant case —If a warrant case is tried by the Magistrate as a summons case, the procedure is bad, and he cannot pass an order under this section dismissing the complaint for non appearance of the complainant—4 C. W N 26

Where two charges, one on a summons case and another on a warrant case, are jointly tried in one trial, and the complainant is absent on the adjourned hearing, the Magistrate ought to make an order of discharge under sec. 259 and not one of acquittal under this section—41 Mad. 727 ; 11 Cal 91.

If a summons case offence is tried under the warrant case procedure, and eventually the Magistrate acquits the accused under sec 247 on account of the absence of the complainant on an adjourned date of hearing, *held* that the acquittal is legal and proper Section 247 lays down a general principle that a person charged with a summons case offence is entitled to an acquittal if the complainant is absent, and there is no reason why this right should be denied to him simply because the Magistrate has adopted a particular procedure for the trial of the case—44 M L J. 119

Effect of dismissal on absent accused —This section has nothing to do with the presence or absence of the accused. If the complainant is absent, the case will be dismissed and the accused acquitted, whether the accused is present or not—17 C W. N. clix. If there are several accused and one is present and the other absent, the order acquitting the accused who is present will put an end to the case also against the other accused who are not before the Court—4 C W N. 346

Appeal to District Magistrate —If an order of dismissal is passed under this section, the District Magistrate has no power to set aside the order of acquittal on appeal, because under sec 417 an appeal against an order of acquittal shall be directed by Government and presented to the High Court—7 Mad. 213.

Revival of Complaint :—The Code contains no provision empowering a Magistrate to revive a case after an order of dismissal—4 C W. N. 26. The dismissal of a complaint under this section amounts to an acquittal—19 W R 52, 21 W R. 61, and bars a subsequent trial on the same facts (section 423) even if good cause is shown for non appearance

of the complainant—45 All. 58, 26 M. L. J. 160; 5 A. W. N. 43, 2 P. L. T. 170. Even the District Magistrate has no power to order the entertainment of a complaint which was dismissed for default of appearance—2 Weir 308. He cannot order the entertainment of a fresh complaint for a different offence on the same facts—37 C. L. J. 253. But if the proceedings are so irregular as not to amount to a trial, the dismissal will not amount to an acquittal and the complaint may be revived—2 Weir 307; Ratanlal 59.

In 2 P. L. T. 170 however it has been held that even if the order of acquittal is passed under a misapprehension, still the Magistrate cannot take cognizance of a fresh complaint, if the order is wrong, the complainant can take proper steps by way of revision, but he cannot file a fresh complaint.

In 40 Mad 977 (Note) it has been pointed out that the accused who is acquitted under this section owing to absence of the complainant on the date fixed for hearing is acquitted without trial on the merits; he cannot be said to have been 'tried' within the meaning of sec. 403, and therefore an acquittal under this section is not a bar to a second complaint of the offence on the same facts. But the Allahabad High Court is of opinion that an acquittal under section 247 acts as a bar to further proceedings in the same way as an acquittal after trial on the merits—45 All. 58.

Fresh process for other offences including the previous one—Where a Magistrate issued process against and summoned the accused persons for one of several offences alleged against them, and acquitted them under this section for default of complainant's appearance, no fresh process could in view of sec. 403 (1) be issued against them in respect of *all* the offences alleged against them on the previous occasion, including the one for which they were summoned and acquitted—2 C. L. J. 622.

Order of adjournment—On default of complainant's appearance the Magistrate has a discretion either to dismiss the complaint and acquit the accused or to adjourn the hearing, or he can even proceed to examine the witnesses in the absence of the complainant. Such a procedure is not illegal if the accused is not prejudiced—24 C. W. N. 199.

The Magistrate cannot adjourn the hearing unless there are sufficient and proper grounds for doing so. The fact that the accused has been guilty of the contempt of the processes of the Court is no good reason for proceeding with the case—17 C. W. N. clx. But a Magistrate can adjourn the hearing for the purpose of allowing the accused time to secure the attendance of his witnesses—16 W. R. 21.

Death of complainant—It is open to doubt whether this section applies where the non appearance of the complainant is due to his death.

But if on the day fixed for hearing the son of the deceased complainant appears and asks the Magistrate to proceed with the case, the Magistrate ought to proceed and should not acquit the accused under this section—1 P L J 262

248 If a complainant, at any time before a final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused

Scope of Section—This section applies only to summons cases—13 Bom 600, 37 Bom 369, 6 Mad 316. A withdrawal of complaint is permissible only in summons cases—21 Cal 103, 5 Mad 378. Ratanlal 461. If the offence charged is a warrant case the Magistrate must proceed with the inquiry or trial in spite of the withdrawal of the complaint, if he finds the elements of the offence set forth in the complaint—13 Bom 600, 37 Bom 369, 3 C W N 548.

Again, this section is limited in its operation to cases instituted upon *complaints* in the strict sense. If A gave information to the Police and the Magistrate took cognizance of the case upon the *Police report* there was no complaint within the meaning of sec 4 (h) and A cannot be permitted to withdraw—23 Mad 626.

This section contemplates a withdrawal of the complaint as a whole. Where a complaint against several accused persons is withdrawn as against one of them, this amounts to a withdrawal of the whole complaint in respect of all the accused—1 P L T 32. The withdrawal of the case absolves not only the accused present but also all the accused—2 P L T 584. Contra—9 O L J 54—23 Cr L J 271, where it is held that the withdrawal against some does not amount to a withdrawal against all.

Withdrawal and Compromise—There is a well marked distinction between a withdrawal of a case under this section and a compromise under sec 345. Compromise contemplates an arrangement between two parties, withdrawal has no such meaning. A case is compromised if with the consent of the accused it is withdrawn; a case is withdrawn under this section *not* with the consent of the accused. Therefore when a petition is filed by the complainant praying for striking off the case the Magistrate should satisfy himself under what section the petition is made. If the case is not being compromised but is being withdrawn without the consent of the accused the petition is not a petition under sec 345 but under this section and the Magistrate may in spite of the petition proceed with the trial and convict the accused—20 C W N 1207.

Who can withdraw—Only the complainant can withdraw the case. In cases of contempt of the lawful authority of a public servant the complainant is the public servant whose authority has been resisted, and not the person injured by such resistance, and the former alone can withdraw—2 Bom 653 Where a Municipal Secretary instituted a complaint, the Municipal Council was not competent to withdraw—27 M 1 J 617

When to withdraw—The complainant can withdraw at 'any time before a final order is passed' But these words do not refer to a time so early as when no process has been issued to the accused. An order of acquittal passed on an application for withdrawal preferred before issue of process is unmeaning and of no avail—36 Mad 315

Magistrate alone can permit withdrawal—This section does not empower a Police officer to entertain an application for withdrawal of a complaint. The permission for withdrawal of a complaint is a judicial act, and the Magistrate alone can do it—Ratanlal 91

May permit—It is discretionary with the Magistrate to permit the complainant to withdraw. The Magistrate can in spite of the application for withdrawal, proceed with the trial and convict the accused—20 C W N 1209 (Patna)

Revival of withdrawn complaint—Where a Deputy Magistrate allowed a complaint to be withdrawn and discharged the accused, the District Magistrate could not revive the case against the accused—25 W R 64

But where the complaint was withdrawn, because there was no sanction (the case being one in which a sanction was necessary), and the accused was discharged, the complainant was competent to lodge a fresh complaint after obtaining the necessary sanction—22 Bom 711

Compensation—Compensation can be awarded under sec 250 to an accused who is acquitted under this section after withdrawal of complaint—1883 P R 24 The rulings in 1888 P R 19 Ratanlal 462, 1870 P R 26, 1871 P R 16, and 1 A W N 555 are no longer good law, since they were decided under the earlier Codes which awarded compensation only in the case of acquittal under section 245 or 247, and not under sec 248. In the present Code, sec 250 is comprehensive enough to apply to any acquittal including an acquittal under this section.

249 In any case instituted otherwise than upon complaint, a Presidency Magistrate, a Magistrate of the first class, or with the previous sanction of the District Magistrate, any other Magistrate, may, for reasons to be recorded

Power to stop proceeding when no complainant

by him, stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction, and may thereupon release the accused.

Where upon a report of the Police that one J had given false information to the Police against certain persons, a Magistrate ordered the prosecution of J under sec. 182 I. P. C., but subsequently upon receipt of another report in another case that the information given by J was true, he ordered the summons issued for the attendance of J to be cancelled, it was held that the Magistrate had full power to cancel the summons under this section—1 P. L. T. 28.

An order under this section neither amounts to an acquittal nor to a discharge. Since it does not amount to an acquittal (see Explanation to sec. 493) it does not bar further proceedings in accordance with law—1913, P. R. 9. And since it does not amount to an order of dismissal of complaint no order can be passed under sec. 437 (now 436) directing further inquiry—*Ibid.*

Frivolous Accusations in Summons and Warrant Cases.

250. (1) If, in any case instituted by
Frivolous or vexatious accusation. complaint as defined in this

Code, or upon information given to a police-officer or to a Magistrate, a person is accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits the accused and is satisfied that the accusation against him was frivolous or vexatious, the Magistrate may, in his discretion, by his order of discharge or acquittal, direct the person upon whose complaint or information the

250. (1) If, in any case instituted upon
False, frivolous or vexatious accusations. complaint
 * * * or upon

information given to a police-officer or to a Magistrate, one or more persons is or are accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits all or any of the accused, and is of opinion that the accusation against them or any of them was false and either frivolous or vexatious, the Magistrate may, by his order of discharge or acquittal, if the person upon whose com-

accusation was made to pay to the accused, or each of the accused where there are more than one, such compensation, not exceeding fifty rupees, as the Magistrate thinks fit

Provided that, before making any such direction the Magistrate shall—

(a) record and consider any objection which the complainant or informant may urge against the making of the direction, and

(b) if the Magistrate directs any compensation to be paid, state in writing, in his order of discharge or acquittal, his reasons for awarding the compensation

(2) Compensation of which a Magistrate has ordered payment under sub-section (1) shall be recoverable as if it were a fine

Provided that, if it cannot be recovered, the imprisonment to be awarded shall be simple, and for such term, not

plaint or information the accusation was made is present, call upon him forthwith to show cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one or, if such person is not present, direct the issue of a summons to him to appear and show cause as aforesaid

(2) *The Magistrate shall record and consider any cause which such complainant or informant may show and if he is satisfied that the accusation was false and either frivolous or vexatious may, for reasons to be recorded, direct that compensation to such amount not exceeding one hundred rupees or, if the Magistrate is a Magistrate of the third class, not exceeding fifty rupees, as he may determine, be paid by such complainant or informant to the accused or to each or any of them*

(2A) *The Magistrate may, by the order directing payment of the compensation under sub-section (2), further order that, in default of payment, the person ordered to pay such*

by him, stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction, and may thereupon release the accused

Where upon a report of the Police that one J had given false information to the Police against certain persons, a Magistrate ordered the prosecution of J under sec 182 I P C, but subsequently upon receipt of another report in another case that the information given by J was true, he ordered the summons issued for the attendance of J to be cancelled it was held that the Magistrate had full power to cancel the summons under this section—1 P L T 28

An order under this section neither amounts to an acquittal nor to a discharge Since it does not amount to an acquittal (see Explanation to sec 493) it does not bar further proceedings in accordance with law—1913 P R 9 And since it does not amount to an order of dismissal of complaint no order can be passed under sec 437 (now 436) directing further inquiry—*Ibid*

Frivolous Accusations in Summons and Warrant Cases

<p>250 (1) If, in any case instituted by complaint as defined in this</p> <p><small>Frivolous or vexatious accusation</small></p>	<p>250 (1) If, in any case instituted upon complaint</p> <p><small>False frivolous or vexatious accusations</small></p> <p>* * * or upon</p>
<p>Code, or upon information given to a police officer or to a Magistrate, a person is accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits the accused and is satisfied that the accusation against him was frivolous or vexatious, the Magistrate may, in his discretion, by his order of discharge or acquittal, direct the person upon whose complaint or information the</p>	<p>information given to a police officer or to a Magistrate, <i>one or more persons is or are</i> accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits <i>all or any of</i> the accused, and is <i>of opinion</i> that the accusation against <i>them or any of them</i> was <i>false and either frivolous or vexatious</i>, the Magistrate may, by his order of discharge or acquittal <i>if the person upon whose com-</i></p>

accusation was made to pay to the accused or each of the accused where there are more than one, such compensation, not exceeding fifty rupees, as the Magistrate thinks fit

Provided that, before making any such direction the Magistrate shall—

(a) record and consider any objection which the complainant or informant may urge against the making of the direction, and

(b) if the Magistrate directs any compensation to be paid, state in writing, in his order of discharge or acquittal, his reasons for awarding the compensation

(2) Compensation of which a Magistrate has ordered payment under subsection (1) shall be recoverable as if it were a fine

Provided that, if it cannot be recovered, the imprisonment to be awarded shall be simple, and for such term not

plaint or information the accusation was made is present, call upon him forth with to shew cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one, or, if such person is not present, direct the issue of a summons to him to appear and shew cause as aforesaid

(2) *The Magistrate shall record and consider any cause which such complainant or informant may shew and if he is satisfied that the accusation was false and either frivolous or vexatious may, for reasons to be recorded, direct that compensation to such amount not exceeding one hundred rupees or, if the Magistrate is a Magistrate of the third class not exceeding fifty rupees, as he may determine be paid by such complainant or informant to the accused or to each or any of them*

(2A) *The Magistrate may, by the order directing payment of the compensation under subsection (2) further order that, in default of payment, the person ordered to pay such*

exceeding thirty days, as the Magistrate directs *compensation shall suffer simple imprisonment for a period not exceeding thirty days*

(2B) *When any person is imprisoned under sub section (2A), the provisions of Sections 68 and 69 of the Indian Penal Code shall, so far as may be, apply*

(2C) *No person who has been directed to pay compensation under this section shall, by reason of such order, be exempted from any civil or criminal liability in respect of the complaint made or information given by him*

Provided that any amount paid to an accused person under this section shall be taken into account in awarding compensation to such person in any subsequent civil suit relating to the same matter

(3) A complainant or informant who has been ordered under sub section (2) by a Magistrate of the second or third class to pay compensation *or has been so ordered by any other Magistrate to pay compensation exceeding fifty rupees* may appeal from the order, in so far as the order relates to the payment of the compensation as if such complainant or informant had been convicted on a trial held by such Magistrate

(4) Where an order for payment of compensation to an accused person is made in a case which is subject to appeal under sub section (3), the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed, or, if an appeal is presented, before the appeal has been decided, *and where such order is made in a case which is not so subject to appeal, the compensation shall not be paid before the expiration of one month from the date of the order*

(5) At the time of awarding compensation in any subsequent civil suit relating to

(5) (Omitted)

the same matter, the Court shall take into account any compensation paid or recovered under this section

Change —The whole section has been redrafted* by sec 69 of the Criminal Procedure Code Amendment Act, 1923 The principal changes introduced are the following —

(1) The words "frivolous or vexatious" occurring in the old section have been substituted by the words 'false and either frivolous or vexatious'

(2) Under the old law the complainant was forthwith ordered to pay the compensation under the present law the Magistrate will call upon him to show cause "The procedure in awarding compensation has been more clearly laid down by directing that a Magistrate in his order of discharge or acquittal may call upon the complainant to show cause why he should not pay compensation and that he shall then consider and record any cause shown and pass such orders as he sees fit* As the section is worded under the old law, the order to pay compensation is part of the order of discharge or acquittal, and the record and consideration of objections is to precede such order The procedure now proposed is more logical" —*Statement of Objects and Reasons* (1914) Moreover, the old law did not provide for the case where the complainant was absent at the time the judgment was delivered, now, power has been given in such a case to summon him to appear and show cause—*Report of the Joint Committee* (1922)

(3) The limit of compensation has been increased from Rs 50 to Rs. 100 unless the Magistrate is a Magistrate of the third class "We think that this increase is amply justified by the present day conditions We do not think that this increase will, having regard to the provisions of section 404, make orders under section 250 appealable where they are not so at present' —*Report of the Select Committee* of 1916

(4) Under the old law, the Magistrate could order imprisonment only *after* failure to recover compensation, but he could not award imprisonment in default in the very order directing compensation, under the new sub section (2A), the Magistrate has now been empowered to award such imprisonment in the order itself

(5) Subsection (2) of the old section, which provided that compensation should be recoverable as if it were a fine, has been omitted as it is provided for in sec 517 The proviso to sub section (2) of the old section has now been re enacted as sub section (2A) with some alterations Sub section (2B) is new

(6) Sub section (2C) is new, and the proviso to this sub section is the same as the old sub section (5)

(7) An appeal shall now lie from the order of a 1st class Magistrate if he awards compensation exceeding fifty rupees See sub section (3) Under the old law, no appeal lay from the order of a 1st class Magistrate

(8) Sub section (4) has been amended to specify the time for payment of compensation where the original case is nonappealable "The amendment which we propose at the end of sub section (4) is to provide for cases in which, though there cannot be an appeal, the acquittal or discharge of the person to whom compensation has been awarded may be set aside in revision The period of one month which we have allowed should be ample to admit of application being made to the superior Court"—*Report of the Select Committee of 1916*

Scope—The words 'any case' show that the provisions of this section are not confined to offences punishable under the Penal Code alone but extend also to offences punishable under special laws—4 N W P H C R 94 *Contra*—14 W R 37

'Instituted upon complaint' etc.—The operation of this section is restricted to cases instituted by complaint as defined in the Code or upon information given to a Police Officer or to a Magistrate It is clear that it will not apply to a case instituted on a *police report* or on information given by a Police Officer—21 CAL 979 It is inapplicable to the case of a complaint lodged by a Police Officer as such—5 C W N 370, 21 CAL 979, 1879 P R 16, 7 C W N 206

A case instituted by the Police on a complaint to them or upon evidence obtained on an inquiry conducted by them, is not instituted upon complaint within the meaning of this section—6 ALL 96, 1 P L J 106 But if the case is originally based on information given to a Police Officer, this section applies although the case was ultimately instituted upon a Police report—14 C W N 326

When a Police officer files a formal complaint in a non cognizable case, the Magistrate can award compensation if the case is false—26 BOM 150

Complaint under Cattle Trespass Act—This section applies to a case in which a false and frivolous complaint has been made under the Cattle Trespass Act Under section 4 (o) of the present Code the word "offence" includes an act in respect of which a complaint may be made under Sec 20 of the Cattle Trespass Act If such complaint is false and frivolous or vexatious compensation may be awarded—29 MAD 517 The rulings in 18 ALL 353, 13 CAL 304 22 CAL 139, 23 CAL 248, 9 MAD 102, and 9 MAD 374 decided under the Code of 1882, are no longer good law

Complaint to a Village Magistrate —A complaint of a non bailable offence to a village headman who is bound to report the substance of the information to the Police under sec 45 (c) is an 'information to a Police Officer' within the meaning of this section and if on such information the Police charged the accused and the Magistrate found the charge to be false and vexatious he could order compensation under this section—39 Mad 1006, 4 L W 71, 32 M L J 78, 1917 M W N 156 If however the information preferred to the village Magistrate is one which he is not bound to report to the Police the preferring of such information does not amount to information to the Police within the meaning of this section, and no compensation is awardable if the information proves to be false—25 Mad 667

Case instituted under sec 476 —Where a case is instituted under sec. 476, at the instance of a person, it cannot be said to have been instituted either by complaint of that person, or by information given to a Police Officer or to a Magistrate—14 Bom L R 1166

Information given through another —Where a person gives information to another to the effect that a certain constable has committed extortion, intending that a complaint should be made on his behalf to a Magistrate, and the complaint was subsequently dismissed as frivolous, it was held that such person was liable to give compensation to the accused, and the fact that he utilized another in giving the information was immaterial—40 All 79 But in 12 S L R 76 it is held that this section does not warrant an order to pay compensation against a person who only instigates the giving of false information but who does not himself make the complaint or give the information to the Police

'Accused of an offence —An institution of proceedings under Chapter VIII is not an accusation of an offence, and this section does not apply if the accusation proves to be false—25 Bom 48, 15 All 365, 36 All 743 7 A L J 743, 1896 P R 4 1902 P R 33, 20 A L J 624 21 A. L J 207

Similarly, an application for maintenance under sec 488 is not a complaint of an offence (the refusal to maintain wife not being an offence) and no compensation can be awarded if the application proves to be false—6 M L T 61

The use of a house as brothel is not an offence, and a complaint as to such use of a house is not a complaint of an offence. No compensation can therefore be awarded if the complaint is frivolous or vexatious—6 S L R 254

An order for compensation cannot be made in regard to a complaint under sec 2 of the Workman's Breach of Contract Act (VIII of 1859),

because neglect or refusal to perform work is not an offence—4 C W. N 253, Ratanlal 617, 4 Mad 234 See also 41 All 322

Section 28 of the Bombay Public Conveyances Act provides a summary remedy for the recovery of the legal fare of a public conveyance, and a complaint under that section is not a complaint in respect of an *offence* within the meaning of this section A Magistrate has therefore no power to make an order awarding compensation under this section in respect of such a complaint—44 Bom 463

“Triable by a Magistrate —This section applies only where the offence is triable by a Magistrate and not where the offence is triable exclusively by the Court of Session but is actually tried by the Magistrate—2 Weir 315, 1902 P R 26, 19 Bom L R 60, 1 Bur L J 38, 20 A L J 433 Even if the Magistrate tries an offence triable by the Court of Session, by virtue of his powers specially conferred upon him under sec 30 and discharges the accused on account of the charge being vexatious, he cannot award compensation to the accused—1902 P R 26, 2 Weir 315, Ratanlal 961, 1902 P R 14, 40 All 615, 1919 P R 15, 1919 P R 1 But where the facts in a case showed that the offence was triable by a Court of Session only, but the Magistrate regarding it as falling under a different head of offences triable by him tried the case and in dismissing the same awarded compensation to the accused, *held* that the procedure was not illegal—45 Mad 29

Summary cases —Compensation may be awarded even if the case is triable summarily—11 Mad 142

The Magistrate by whom case is heard —An order of compensation can be made only by the Magistrate who hears the case—12 A W. N 58 The substitution of the word ‘heard’ for the word ‘tried’ occurring in the Code of 1872 renders a complete trial no longer necessary, an order for compensation can be made after hearing only a part of the case, but evidence must be *heard*—10 W R 61 A Magistrate who has heard nothing of the case except the complainant’s plea against the order, can not make an order under this section—12 A W N 58

‘The Magistrate by whom the case is heard does not include an Appellate Court Such a Court in setting aside a conviction cannot order the complainant to pay compensation—39 Cal 157 (overruling 14 C W N 212), 3 Bom L R 841, 7 Bom L R 998

Where part of the evidence was heard by one Magistrate and then the case was made over to another Magistrate under section 346 and the latter Magistrate heard the rest of the evidence and decided the case, *held* that the latter Magistrate was competent to order compensation—19 A L J 651

Discharges or acquits the accused—The word 'heard' shows that the case must proceed as far as hearing. If a complaint is summarily dismissed under sec. 203, without issue of process, such a dismissal is not an order of discharge or acquittal within the meaning of this section—29 All 137, 1897 P R 14, even though the accused is present without issue of process, compensation cannot be awarded—1906 P R 3.

An order for compensation may be passed where the accused is acquitted under sec. 245—6 Cal 581, 5 Mad 381, 10 Bom 199, or under sec. 247—1888 P R 14, 4 A W N 115, 11 A W N 120 or under sec. 248—1883 P R 24 (see notes under sec. 248). But compensation cannot be awarded when the case is compounded, because there is neither discharge nor acquittal. And though the accused is acquitted after composition, such an acquittal is not one contemplated by this section—Ratanlal 97, 10 Bom L R 1056, Ratanlal 700 7 C P L R 2, 1888 P R 19, 1910 P R 30.

In order that compensation may be granted it is necessary that there must be a complete discharge or acquittal. If the accused is charged with more offences than one, he must be discharged or acquitted of all the offences. A discharge or acquittal in respect of one of the offences is a partial discharge and cannot entitle the accused to compensation—24 Cal 53 40 All 610, 12 S L R 87. If there are several accused, and some only of them are acquitted or discharged, the complainant may be ordered to pay compensation only to those who have been discharged or acquitted but not to the others—5 Mad 381, 1877 P R 15.

Moreover the provisions of this section as to compensation can only apply to cases where the order of discharge or acquittal is legal—(1900 1902) L B R 44.

False and frivolous or vexatious—Under the old law, if the charge was frivolous or vexatious, this was sufficient to entitle the accused to compensation and if over and above the charge was false as well, the accused was equally entitled to compensation—30 Cal 123 2 Weir 313, 5 Bom L R 128 21 Mad 237, 26 All 512, 37 Bom 376, 1903 P L R 156 1914 U B R 3rd Qr 3r. Under the present law, the charge *must be* false, besides being frivolous or vexatious. The rulings in 34 All 354 and 4 Bom L R 645 (where it was held that this section did not apply if the charge was false) are now overruled.

In a Burma case it was erroneously held that it was sufficient to make the complainant liable to pay compensation if the charge was false, even though it was neither frivolous nor vexatious—19 Cr L J 172 (Bur). This is incorrect. 'We do not think that the procedure of section 250 should be used in every false case unless the case is *also* either frivolous or

vexatious In more serious cases it is desirable that the Magistrate should act under section 476 with a view to the institution of a prosecution"—*Report of the Joint Committee (1922)*

If a charge is neither false nor frivolous, the Magistrate is not justified in awarding compensation—1919 P L R 41

The word 'vexatious' indicates an accusation merely for the purpose of annoyance—6 Cal 799 An accusation cannot be said to be vexatious unless the main intention of the complainant be to cause annoyance to the person accused—11 S L R 55 A vexatious charge may be partly true, and the idea conveyed by the word is that the object of the person making the accusation should be primarily to harass the persons accused—21 Cr. L J 226 (Nag)

The word 'frivolous' means silly' or 'without due foundation'—21 Cr L J 41 (Nag) Whether the charge is frivolous or vexatious is a question of fact to be decided by the Magistrate investigating the complaint—2 Weir 319 But the knowledge and intention of the complainant must be looked into Compensation should not be granted to the accused where the complainant did not *know* that his complaint was false and where it is clear that the *intention* of the complainant was not to vex or harass the accused—11 S L R 55

Where the complainant believed his case to be true at first, but subsequently after enquiries found that his belief had been proved to be untrue, it would be his duty frankly to tell the Court that he had made a mistake, and if he omits to do so it would show unwarrantable malice on his part and he would be liable to pay compensation—19 Cr L J 172 (Bur)

"By his order" —The order calling upon the complainant to show cause must be made in the same order by which the Magistrate acquits or discharges the accused Thus, where the accused was discharged, and in the order of discharge a conditional order for compensation was passed subject to the complainant showing cause, and the order of compensation was made absolute on a subsequent day to which the case was adjourned for the complainant to show cause, it was held that both the orders were passed at one proceeding and were not illegal—36 All 132, 18 C W. N 702, 7 S L R 123, 25 A W N 214, (1916) 2 M W N 159; 1917 P R 31, 22 Bom L R 184, 8 Bom L R 847. What is intended by the Legislature is that the order of discharge and the order directing compensation must be made in one continuous proceeding, and not in two separate proceedings Therefore where the Magistrate at the time of discharging the accused made no order as to compensation, but on a subsequent day ordered that the complainant should pay compensation, the order was illegal, because it was not passed

in the *same* proceeding in which the accused was discharged—25 All 315, 34 All 354, 1905 P R 57, 38 Cal 302, 10 N L R 8

The complainant must be given an opportunity to show cause and the Magistrate cannot make the order absolute owing to the absence of the complainant—11 A W N 63, 18 C W N 1277 Under the present law, if the complainant is absent, summons may be issued to him to show cause

Who can be ordered to pay compensation —Public officers are not exempted from the liability to pay compensation for frivolous and vexatious complaints—2 Weir 317 A Police Officer who lays information before the Magistrate in a non cognizable case prefers a complaint within the meaning of this section and if his complaint be false he may be ordered to pay compensation—26 Bom 150, 6 S L R 82

Where a Municipal peon under sanction of the Municipality charged a certain person of an offence which was found to be false the order of the Magistrate directing the peon to pay compensation to the accused was held to be legal—Ratanlal 309

Where certain persons gave information as witnesses of an offence to a constable, and upon the constable's information to the Sub Inspector a case was instituted which was afterwards found to be false, *held* that those persons could not be ordered to pay compensation, because they were not the "persons upon whose information the accusation was made" within the meaning of this section—13 S L R 166 This section is a penal one and should be construed strictly There is no authority for introducing into it words which would extend the liability to pay compensation to individuals other than the actual complainant or person who gives the information on which the case is instituted—*Ibid* This section does not warrant an order to pay compensation against a person who only instigates the giving of false information but who does not himself make the complaint or give the information to the Police Officer—12 S L R 76 But see 40 All 79 cited at p 567 *ante*

Where a process server reported to the Court that he was obstructed by the accused in executing a writ of attachment and a report was thereupon made by the Court to a Magistrate, and the Magistrate found the case to be false and directed the process server to pay compensation to the accused it was held that the order of the Magistrate was wrong because the process peon was not a complainant within the meaning of this section—1 Bom 175, 26 All 183

A person preferring a complaint on behalf of another is not liable to pay compensation A master preferring a complaint on behalf of his servant, 1869 P R 24, or a servant preferring a complaint on behalf of his master, 1869 P R 61, cannot be ordered to pay compensation

A guardian or next friend of a minor complainant is not liable to pay compensation—1912 P W R 1

Where a written complaint prepared by the Police Officer was sent through a constable to the Magistrate, the constable who was merely a bearer of the complaint, and acting under the order of his superior officer, cannot be ordered to pay compensation—21 M L J 844.

To whom compensation to be awarded—Compensation is awardable only to the person who had suffered from the accusation and not to his relatives—1866 P R 89, 1866 P R 97, 1868 P R 24

Where there are several accused and one of the accused is discharged on the ground that the complaint against him is vexatious, he can be awarded compensation but not the others—1877 P R 15 5 Mad 381

Sub section (2)—Record of objections etc—The Magistrate, before passing an order for compensation must comply with the provisions of sub section (2) of this section, he cannot pass an order for compensation, without calling upon the complainant to show cause, and without recording and considering any objection which the complainant may urge—Ratanlal 725, 2 Weir 310 39 M L J 484, 24 Bom L R 805, 3 Bom L R 777, 1906 U B R (Cr P C) 51, 1 P L T 558 24 O C 261 3 P L T 203, if he omits to record the objections, it is more than an irregularity and cannot be cured by sec 537—1906 U B R (Cr P C) 51

Moreover a Magistrate should in his order awarding compensation state his reasons why he deems the complaint to be vexatious, and should also state in his judgment the facts of the case with a criticism of the incidents involved in it—10 C W N 544

The complainant may show cause with reference to the evidence already recorded, but he cannot adduce *further evidence* This section does not require that separate proceedings should be held and fresh evidence taken—18 A W N 198 But where the Magistrate discharged the accused after hearing only some of the witnesses produced by the complainant, the Magistrate, before awarding compensation, ought to hear the remaining witnesses of the complainant—44 Mad 51

Amount and nature of compensation—The loss sustained or the inconvenience undergone by the accused ought to serve as a guide to the Magistrate in awarding compensation—1 A W N 167 But he cannot impose more than Rs 50 (now Rs 100)—1919 P R 15, and he cannot impose it as a fine otherwise than by way of compensation—2 N W P H C R 430

The award of compensation is only by way of amends to the accused and is not a thing which can be credited to Government—1856 P R 102; 1869 P R 1 It is not a fine but it is in the nature of damages for

malicious prosecution (and cannot be credited to Government) though it is recoverable in a summary way as if it were a fine—26 Mad 127

Subsection (1A)—Imprisonment in default of compensation—If the compensation be not paid the Magistrate may send the complainant to jail, but before the complainant is thrown into prison the Magistrate is bound to issue a warrant for the levy of the compensation by distress and sale of the moveables of the complainant—3 L B R 32, 26 Mad 127 Even if the person pleads that he has no moveables, a warrant should still be issued—26 Mad 127 In 23 W R 64 it has been held that if he pleads that he has no goods the Magistrate may send him to jail

Under the old law, an order for imprisonment could be made only on failure to recover the compensation. Such an order could not be made *alternatively in the order* for payment of compensation—2 Weir 320, Ratanlal 611 1903 P R 18 18 All 96 19 All 73 21 Cal 979, 1895 P R 13 (1916) 2 M W N 159 21 Cr L J 226 (Nag) 18 Cr L J 1014 (Cal) the order for imprisonment could not be made until some attempt was made to recover the amount in the manner provided for recovery of fine—21 Cal 979 22 Cal 586 28 Cal 251, 5 C W N 213, 18 All 96, 19 All 73 18 C W N 702 1 P L T 558, 18 Cr L J 1014 (Cal) Under the new subsection (2A) the order for imprisonment can now be made *in the order* awarding compensation

Sub section (2C)—This section does not bar civil or criminal proceedings. The object of this section is not to punish the complainant but to award by a summary order some compensation to the person against whom a frivolous or vexatious complaint is brought leaving it to him to obtain further redress against the complainant by a regular civil suit or criminal prosecution—30 Cal 123

Proceeding under section 476—The Joint Committee (1922) observe 'In more serious cases it is desirable that the Magistrate should proceed under section 476 with a view to the institution of a prosecution

A Magistrate who passes an order of compensation under this section can subsequently make a complaint (under sec 476) to prosecute the complainant for preferring a false charge under sec 211 I P C—21 Mad 237, 2 Weir 311, 35 Bom 376, 15 Bom L R 49, 10 S L R 162 15 W R 9 Similarly, where the Magistrate makes a complaint for the prosecution of a complainant under sec 211 I P C for bringing a false charge he is not precluded from passing an order under this section directing the complainant to pay compensation to the accused—1907 P W R 30, 1901 P R 18 7 S L R 10 *Contra*—26 Cal 181, 22 Cal 586 But of course it is discretionary with the Magistrate to make a complaint under sec 476 for prosecution of the complainant as well as to proceed under this section, and the question whether the discretion has been

rightly exercised by the Magistrate depends upon the facts of the particular case. If the false charge is of such a nature that a prosecution is necessary on the ground of public policy, the Magistrate would exercise his discretion wrongly in awarding compensation instead of making a complaint under section 476. But if the charge is such that no prosecution is necessary, then the exercise of his discretion in awarding compensation is proper—27 Mad 59. See also 20 Cr L J 226 (Patna) [It should be noted that all these cases are cases relating to sanctioning prosecution (now abolished) under sec 195, but the principle of these cases applies also to the preferring of complaints under sec 476]

Subsection (3)—Appeal —Under the old law, no appeal or revision lay from an order of compensation passed by a 1st class Magistrate—1 Bom L R 350, 7 Bom L R 998, under the present law, appeal is allowed from an order of such Magistrate if the compensation awarded exceeds rupees fifty.

Notice to accused —Though there is no express provision that notice should go to the accused, still it is desirable that the accused should have notice of the appeal in order that he may have an opportunity of supporting the order passed in his favour—29 Mad 187, 28 M L J 204. But absence of notice to the accused will not vitiate the appellate proceedings and will not make the appellate order liable to be set aside—33 Mad 89, 41 M L J 172.

Notice to Crown —But it is imperative that notice of the appeal should be given to the Crown under sec 422—29 Mad 187, 41 M L J 172.

Revision —The High Court in revision can set aside an order of compensation passed by a Magistrate, and can order repayment of the money paid—1903 P R 29, 1884 P R 14, 1885 P R 12.

Death of party —If, pending the revision, the complainant (i.e. the party who has been ordered to pay compensation) dies the revision petition does not abate but may be continued by his legal representatives—1908 P R 24.

Where after the passing of the Magistrate's order the accused died, and the complainant applied to the High Court for revision, the High Court refused to pass any order because the accused could not be served with notice—Ratanlal 634.

CHAPTER XXI.

OF THE TRIAL OF WARRANT-CASES BY MAGISTRATES.

If a warrant case is tried as a summons case the procedure is illegal and the conviction is liable to be set aside—29 Mad. 372. If in such trial the accused is acquitted under sec 245, the order of acquittal will at best operate as an order of discharge under sec 253—6 A. W. N. 260, 8 A. W. N. 96.

The fact that a summons instead of a warrant has been issued in a warrant case does not justify the procedure as in a summons case—10 A. W. R. 31.

If a trial is commenced as a warrant case, it must be ended as a warrant case and not as a summons case; a sudden change of procedure in the midst of a trial is illegal. Therefore where a complaint alleged the commission of certain offences which are triable as warrant cases, and the processes issued to the accused as well as the commencement of the proceeding showed that the accused were being tried for those offences, but the Magistrate after taking the evidence of some of the witnesses for the complainant recorded an order that the offences as disclosed were triable as summons cases, and then he proceeded with the trial as in a summons case, without framing a charge, *held* that the procedure adopted by the Magistrate was highly illegal and the trial should be set aside—19 A. L. J. 6.

The question whether a case is triable as a summons case or as a warrant case is to be decided by reference to the *complaint* and the *notices* issued to the accused and also to the *commencement* of the case under certain sections of the Penal Code and not by reference to the particular sections under which the *conviction* takes place—19 A. L. J. 6.

If two charges arising out of the same facts under the same circumstances are framed, one of a summons case and another of a warrant case, the procedure should be that laid down for a warrant case—11 Cal 91; 1915 M. W. N. 546.

251 The following procedure shall be observed by Magistrates in the trial of warrant cases.

Procedure in warrant-cases.

In trying warrant cases, the procedure of this chapter must be strictly followed. The Magistrate cannot follow a procedure which had grown up by usage in the course of years, and which materially differs from that

rightly exercised by the Magistrate depends upon the facts of the particular case. If the false charge is of such a nature that a prosecution is necessary on the ground of public policy, the Magistrate would exercise his discretion wrongly in awarding compensation instead of making a complaint under section 476. But if the charge is such that no prosecution is necessary, then the exercise of his discretion in awarding compensation is proper—27 Mad 59. See also 20 Cr L J 226 (Patn). [It should be noted that all these cases are cases relating to sanction for prosecution (now abolished) under sec 195, but the principle of these cases applies also to the preferring of complaints under sec 476.]

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laid down in this chapter, such a procedure is more than an irregularity and not curable by sec 537—17 Bom L R 490 The Magistrate cannot follow an arbitrary procedure of his own See 1883 P R 29

A Presidency Magistrate must follow the procedure laid down in this chapter, subject to the special provisions of sec 362 as to the mode of taking down the evidence—Ratanlal 539

'Trial' when begins —The trial of a warrant case commences when the accused appears or is brought before the Magistrate and the Magistrate proceeds to take evidence in support of the prosecution (sec 252) The words "claims to be tried" in sec 256 do not mean that no trial commences until after the accused refuses to plead or does not plead or claims to be tried—3 L B R 280 But see 38 Mad 385 cited under sec 254

252 (1) When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution

Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court

(2) The Magistrate shall ascertain, from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before himself such of them as he thinks necessary.

Change —The proviso has been newly added by sec 70 of the Criminal Procedure Code Amendment Act, 1923 A similar change has been made in section 244, q v

"Is brought before the Court" —It is immaterial if the accused is brought before the Court by an illegal arrest Where a subject of a Native State committing an offence in British territory fled to his own country, and the British Police, without the intervention of the State authorities, pursued him and arrested him in that State, it was held that his illegal arrest would not vitiate his subsequent trial and conviction—1899 P R 6, 7 Bur L R 66

'Hear the complaint' —Hearing a complaint within the meaning of this section does not involve his *examination on oath*, and a trial of a

warrant case is not vitiated merely because it did not begin with an examination of the complainant by the Court—42 M L J 108

Taking evidence for the prosecution—As soon as the accused is brought before the Magistrate he has a right to have the evidence against him recorded at as early a period as possible, and the fact that there is or may be a great body of evidence forthcoming against him is not a good ground for his detention for an inordinate period—6 Mad 63

It is the duty of the prosecution to bring before the Court all the persons who are alleged or are known to have knowledge of the facts or are likely to give important information—to Cal 1070, 8 Cal 121, 14 All 521, 15 All 6, 14 Cal 245. If such witnesses are not called, without sufficient cause being shown, the Court may properly draw an inference adverse to the prosecution—8 Cal 121

The Magistrate is bound to examine every one of the witnesses called by the complainant—4 Mad 319, 1908 P W R 3, he cannot say beforehand whether the evidence of a certain witness will be material or not—Ratanlal 21. He cannot refuse to examine any witnesses simply because their evidence will be a mere repetition of what has been already given by the other witnesses—3 Cal 389, 2 All 447. But if the Magistrate considers the charge to be groundless, he can discharge the accused without examining all the witnesses (sec. 253)—(1911) 1 M W N 149, Ratanlal 201

An accused should be given, if he so desires, an opportunity to cross-examine the prosecution witnesses, even though a charge is not framed—8 C W N 838. But the prosecution is not bound to tender the witness for cross examination, the prosecution is not bound to do anything more than make a witness appear in Court, so that the accused may call him or not as he likes—14 Cal 245. Moreover the prosecution is not bound to put such of those as he does not examine into the witness box to be cross-examined. But he should not refuse to put into the box for cross-examination a truthful witness, merely because his evidence may be favourable to the defence—16 All 84

Summoning witnesses—The Magistrate has a discretion in summoning witnesses, and he is not bound to summon every person named as a witness for the complainant—23 W R 9. The Magistrate can use his discretion in selecting out of the list of witnesses, those who seem to be necessary and those who seem to be unnecessary. But the power is to be exercised with caution and the Magistrate must see that there be no miscarriage of justice by excluding an important witness—12 A L J 15

After the witnesses in support of the prosecution are heard, it is the duty of the Magistrate to see that the prosecutor is not allowed to set the Court on to a roaming inquiry, summoning persons in the hope that

something might be elicited which may help his case. The prosecutor must come with his case fully prepared and there is no section in the Code which authorises him to file a fresh list of prosecution witnesses—12 A L J 15

When witnesses do not obey the summons the prosecution has a right to call upon the Court to compel their attendance—6 C W N 548

It is not proper for the Magistrate to issue a warrant in the first instance, it is only when the summons is disobeyed that serious measures may be taken—1907 P W R 22

Process fee —There is nothing in this Code which enables a Magistrate to demand from even the complainant the expenses to be incurred by his witnesses though such a power is conferred by sec 244 (3) in a summons case—8 N L R 65. The dismissal of a complaint in a warrant case for non payment of process fee is illegal—2 Weir 323

Inspection of documents —The accused is entitled to inspect all documents produced by the complainant as evidence against the accused and filed as exhibits, and not merely to get certified copies thereof—1 Bom L R 433. But so long as the documents are not filed but merely in the possession of the prosecution the accused has no right to call for their production or to inspect the same until after a charge has been framed—8 S L R 267 (cited under sec 257)

253 (1) If upon taking all the evidence referred to in

Discharge of accused Section 252, and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless

Procedure —The procedure prescribed by these sections should be strictly followed. The Magistrate should first take the evidence of the complainant and his witnesses (sec 252) and if necessary examine the accused (sec 253) and then apply the law to the criminal acts to find whether there is *prima facie* evidence then frame charges (sec 254) and
 accused " thereto (sec 255) and enter into defence (sec
 " " Magistrate after examining the prosecution
 the accused and the witnesses for the

defence (sec 256), without having drawn up a charge and then discharged the accused under sec 253, the procedure was contrary to law and the accused should be treated as acquitted under sec 258—1883 P. R 29 In 18 Cr L J 1006, however, where the Magistrate followed the same procedure as in the Punjab case, it was held that although the procedure adopted was highly irregular and unwarranted, still as the procedure was in substance that laid down in this chapter the omission to frame a charge and record a plea would not invalidate the order of discharge Sec 535 (1) would cure the irregularity

"Taking all the evidence" etc —A Magistrate is not competent to discharge an accused person until the evidence of all the witnesses named for the prosecution has been taken—4 Mad 329, 2 C L R 389, 22 W R 25, 20 W R 67, Ratanlal 21, 1908 P W R 3 Although he has a discretion to summon or not every person named as a witness by the complainant—23 W R 9, still he is not justified in discharging an accused person without examining all the witnesses who are present in Court—11 C W N lxxxiii If, however, upon examination of some of the witnesses, the Magistrate considers the charge to be groundless, he can discharge the accused under subsection (2) without examining the other witnesses—(1911) 1 M W N 149

Where a case was transferred from a Bench of Magistrates, who had already recorded some evidence, to a Deputy Magistrate, the latter is bound to examine the evidence already recorded, and cannot discharge the accused without considering the evidence—38 Cal 828

Discharge —An order of discharge under this section does not amount to an acquittal, and the Sessions Judge can under section 437 (now 436) have the accused put upon his trial inspite of the discharge—5 W R 58, 4 N W P H C R 23

Orders which amount to discharge —Where a warrant case which can not be compounded, is compounded and the case dismissed, such dismissal amounts only to a discharge—1 Bom 64 Ratanlal 391 When after the issue of process, the Magistrate does not think it proper to proceed any further, the termination of the proceedings amounts to an order of discharge—4 C W N 24 Where no charge was drawn up, and the accused was not called upon to plead or enter on his defence, the release of the accused does not amount to acquittal but to a discharge under this section—4 B L R App 1

Order of discharge when improper —A Magistrate ought not to discharge the accused merely because he was illegally arrested *eg* where the Police arrested him without warrant in a non cognizable case —Ratanlal 73, so also a Magistrate ought not to discharge a person

merely because he has no jurisdiction to try the case. In such a case he ought to proceed under section 346—2 Weir 323

A Magistrate cannot discharge or acquit the accused upon withdrawal of complaint in a non compoundable case. Such a procedure is allowed in summons cases, and not in warrant cases. The Magistrate should proceed with the inquiry in spite of the withdrawal of complaint—13 Bom 600, 37 Bom 369. Similarly a Magistrate cannot dismiss the complaint under this section if the complainant is absent, and the offence is a non compoundable one. Such a dismissal is an application to a warrant case of the procedure of a summons case—10 Cal 67, 4 C W N 26, 20 C W N 698, Ratanlal 524, 1 C W N 57. But now see sec 259 under heading 'Scope of Section'

An order of discharge can be made when, according to the words of the section no case has been made out which if unrebutted would warrant the conviction of the accused, but when there is a body of evidence which if believed would justify a conviction, it is better to draw up a charge and dispose of the case finally, than to discharge the accused—1909 P W R 18

An order of discharge cannot be made after a charge has been framed, such an order is erroneous and would amount to an acquittal under section 258—1903 P R 14

Fresh proceedings —The dismissal of a complaint or the discharge of an accused person does not bar a fresh complaint being entertained or a fresh inquiry held into the case against the accused, and it is not necessary that the previous order of discharge must be set aside before fresh proceedings can be taken—Ratanlal 350, 28 Cal 211, 31 Mad 543

This power of revival of proceedings is vested in all Magistrates including the Magistrate who discharged the accused. But Magistrates are bound to exercise due discretion, to take that discharge into account and to avoid any such oppressive proceedings as may either expose them to punishment under section 219 or 220 1 P C or to a civil action on the part of the accused—Ratanlal 350. No rehearing should be made of a case which has been disposed of by an order of discharge by a Magistrate of co ordinate jurisdiction, except where there has been a manifest error or miscarriage of justice—29 Mad 126. An order of discharge passed under this section cannot be set aside and prosecution started afresh unless there are new materials before the Magistrate which were not before him formerly, and unless upon those materials there is a probability of the conviction of the accused persons—23 Cr L J 236 (Pat)

Power of District Magistrate —Where an accused person has been discharged under this section, the District Magistrate can himself hold a

further enquiry or can direct such enquiry to be held by a Subordinate Magistrate—18 Cr L J 706 (All) ; 9 All 51, 14 Mad 334 ; 32 Mad 220, 20 W. R 46 ; 20 W R 47. *Contra*—6 Mad 25.

Sub section (2) —When a Magistrate is reasonably convinced on what has been already deposed that a criminal charge cannot be sustained, he is relieved from the necessity of going on with the trial and can discharge the accused—Ratanlal 201, (1911) 1 M W N 149. The Magistrate can discharge but not *acquit* the accused—6 W R 13.

If the evidence recorded does not raise any presumption that the accused has committed any offence but merely leads to a doubt, the proper course would be to discharge the accused, and not to proceed to frame a charge—1906 P. R 2.

Recording reasons —The Legislature does not render the writing of reasons necessary when the Magistrate discharges the accused person after he has heard all the evidence for the prosecution. It is only when he discharges under sub-section (2) without hearing all the evidence that he is bound to record reasons. But even in the former case the Magistrate should record his reasons, having regard to the fact that the order is not final—9 Bom L R 250.

254 If, when such evidence and examination have been

Charge to be framed
when offence appears
proved

taken and made, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try, and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

"Evidence and examination" —It is not necessary for a Magistrate to examine more witnesses than are sufficient to convince him of the truth of the charge, and with that view he can put questions to the accused. The answers given to such questions will have a great effect upon the question as to the witnesses to be examined for the prosecution. And if on questions put to the accused, answers which leave no doubt as to the commission of the offence are elicited, the Magistrate may frame a charge and call upon the accused to plead—3 M H C. R. App 2.

Charged when to be framed —It is not necessary that the Magistrate should wait till the whole of the evidence for the prosecution has been taken ; Cf. the words 'or at any previous stage' ; the moment the stage is reached

'when there is ground for presuming that an accused person has committed an offence, the examination of the accused should be taken up, and the charge sheet drawn up, and the remaining witnesses for the prosecution should be examined—8 A L J 707

Charge to be framed when offence appears proved —It is when the prosecution has proved all the facts necessary to constitute the offence charged against the accused, that a charge should be framed. If the evidence recorded does not lead to any presumption that the accused has committed any offence, but merely raises a doubt, the Magistrate should give the accused the benefit of the doubt and discharge him under sec 253 and should not proceed to frame a charge—1906 P R 2

If other offence is proved —If on the evidence a Magistrate finds that an offence different from the one expressly charged against the accused has been committed, he has power to frame a charge with regard to the other offence—5 B H C R 100, and need not dismiss the complaint with leave to the prosecution to institute a fresh and more comprehensive complaint 8 W R 82. Thus, where a charge of defamation had been framed against the accused, and the complainant in her deposition further charged him with using criminal force, and thereupon the Magistrate tried him for both the offences, acquitted him of the former offence and convicted him of using criminal force, it was held that the procedure was legal—3 Bom L R 675. If, when a case is being tried as a warrant case and a charge is drawn up thereof it is intended to proceed against the accused for a further offence triable only as a summons case, that offence should form part of the charge—29 Cal 481

'Which such Magistrate is competent to try and adequately punish' —Sec 254 is very restrictive, for it provides that the Magistrate shall try an accused person only for an offence which in his opinion can be adequately punished by him. A Magistrate has to exercise a discretion in the matter of every complaint that is brought before him—16 Bom 580. A Magistrate ought not to frame a charge under this section, if he is of opinion that he cannot adequately punish the offence—Ratanlal 499, 1903 U B R 33. If the Magistrate is of opinion that he cannot adequately punish in the case, he can commit the case to the Sessions although the case may be exclusively triable by a Magistrate—24 Cal 429. A case which 'ought to be tried by the Sessions Court within the meaning of Sec 207 is one which the Magistrate is not competent to try and adequately punish—4 Bom L R 85. But the more important consideration of the two is whether the Magistrate can try. If therefore a second or third class Magistrate has jurisdiction to try a case, he can frame a charge even though he intends to submit the case to the District Magistrate for punishment—1905 U. B R 33

But in drawing up a charge, the most important consideration to be taken into account is—what is the offence disclosed. It is the Magistrate's duty to draw up a charge in accordance with the offence disclosed, and not to consider such consequences as whether he can adequately punish the accused or whether he should send up the case to the Sessions—1901 P R 1, 1906 P R 2

Charge —Contents —A charge under this Section should allege all that is necessary to constitute the offence charged, and all that is requisite in order that the accused may have notice of the matter with which he is to be charged. It should not allege positively anything of which the allegation in a positive form is not justified by the materials before the Court—1889 P R 26

Effect of framing charge —Proceedings before a Magistrate in a warrant case under this chapter are only an *inquiry* until a charge is framed, and on a charge being framed become a *trial*—38 Mad 385. But see 3 L B R 280, cited under sec 251

When a Magistrate frames a charge under this section he indicates thereby that a *prima facie* case exists against the accused and he cannot acquit the accused or dismiss the case without hearing the prosecution and the defence evidence, he is bound to proceed with the case—7 C W N 521

Omission to frame charge —An omission to frame a charge according to this section would not invalidate an order of acquittal nor would render the acquittal equivalent to a discharge—3 All 129

255 (1) The charge shall then be read and explained to the accused, and he shall be asked whether
(Plea) he is guilty or has any defence to make

(2) If the accused pleads guilty, the Magistrate shall record the plea, and may in his discretion convict him thereon

'Explained' —The charge must be read out and explained to the accused, and the record must show that the Magistrate has done so. Where all that is found on the record is only a narrative by the Judge of what occurred and of the statements made by the prisoner, it cannot be inferred from the record that the charge has been explained to the accused as required by this section—7 Cal 96. The charge should be so explained to the accused that the Magistrate is sure that the accused has understood the nature of it thoroughly and it is then that his plea should be received—5 Cal 826. If there are any aggravating circumstances of the offence those circumstances should be set forth in the charge,

so that the accused person may know what it is to which he pleads guilty and the full effect of such plea, or in case he pleads not guilty, he may know what material facts he is called upon to rebut—Ratanlal 55

Where the charge was not explained to the accused, the High Court set aside the conviction and ordered a new trial—9 Mad 61

Plea—An admission which does not admit all the elements of a charge is not a plea of 'guilty' to a charge. Therefore where, in a case of murder, the prisoner pleaded that he struck his wife with a *dao* but he did not intend to kill her, it was held that the acknowledgment cannot be treated as a plea of guilty, since the intention to murder is denied—25 W R 23

Where an accused person does not formally plead guilty, the fact that he throws himself at the mercy of the Court should not prejudice him—12 C W N 140

Plea of Pleader—A pleader cannot be called upon to plead under this section on behalf of his client, and it is improper for a Magistrate to act upon such plea, though made in the presence and hearing of the accused. It would be more regular in form for a Magistrate to call upon the accused to say with his own lips whether he denies the truth of the complaint—6 Bom L R 861. But when the accused has been permitted under sec 205 to appear by a pleader the latter may perform all acts which devolve upon the accused in the course of the trial, and he can plead guilty or not guilty under this section—6 S L R 206

Record of plea—If the plea is not recorded, the conviction is liable to be set aside—7 Cal 96. The Court must record the actual words used, a narrative of what occurred and of the statements made by the prisoners is not a proper record of the plea—7 Cal 96. If the statement of the accused is in a foreign language the Magistrate need not record it in the language in which it is made, but the record must be in the language in which it is interpreted—5 Cal 826

Conviction on Plea—In a warrant case although an accused can be convicted on his own plea of guilty—3 L B R 279 still a conviction should not be made unless there is evidence in the record to support the conviction. It is highly improper in a warrant case to convict an accused on his own admission alone without recording any evidence for the prosecution and without framing a formal charge—29 Mad 372

Again in order that a conviction on a plea of the accused may be sustained it is necessary that the accused should admit in his plea all the elements of the offence. If he admits that he killed the deceased, but he denies that he had any intention of killing her, the Magistrate cannot convict him on such statement. Such a confession does not amount to a plea of guilty—25 W R 23

If the accused person admits some or all of the facts alleged by the prosecution, but pleads 'not guilty' the proper procedure for the Magistrate is to proceed to trial according to law, and not to convict him on the admission without taking evidence—9 Bom L R 1346

If the accused pleads guilty to one offence, the Judge cannot convict the accused for another offence, e.g., if the accused pleads guilty to a charge of murder, he cannot be convicted for culpable homicide not amounting to murder—13 W R 55

255A *In a case where a previous conviction is charged under the provisions of Section 221, sub-section (7), and the accused does not admit that he has been previously convicted as alleged in the charge, the Magistrate may, after he has convicted the said accused under Section 255 sub-section (2) or Section 258, take evidence in respect of the alleged previous conviction and shall record a finding thereon*

Procedure in case of previous convictions

This new section has been added by section 71 of the Criminal Procedure Code Amendment Act 1923

'We think that this addition is necessary after section 255, to provide for a case where previous conviction is also charged. Definite provision is made for this in the case of trials before a Court of Session (see section 310), but it does not seem to have been provided for by the Code in the case of a Magistrate's trial"—*Report of the Select Committee of 1916*

"It was suggested to us that the new section 25A is unnecessary on the ground that though a procedure for the proof of previous convictions is necessary in a Sessions Court to prevent the Jury or the Assessors from being prejudiced by anything they may hear as to the accused's previous record yet in warrant cases the same considerations do not apply. On the whole, however, we think the new section may serve a useful purpose and we have retained it"—*Report of the Joint Committee of 1922*

256 (1) If the accused refuses to plead, or does not plead, or claims to be tried, he shall be required to state at the commencement of the next hearing of the case or if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith whether, he wishes to cross examine any, and, if so, which, of the

Defence

witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be recalled and, after cross-examination and re-examination (if any), they shall be discharged. The evidence of any remaining witnesses for the prosecution shall next be taken, and after cross-examination and re-examination (if any), they also shall be discharged. The accused shall then be called upon to enter upon his defence and produce his evidence.

(2) If the accused puts in any written statement, the Magistrate shall file it with the record.

Change:—The italicised words have been added in subsection (1) by section 72 of the Criminal Procedure Code Amendment Act 1923. The Bill of 1914 proposed to add simply the word 'forthwith' but the *Select Committee of 1916* added the remaining words, observing—

"We think that merely to insert the word 'forthwith' as proposed by this clause of the Bill, might in some cases cause hardship to the accused. We think that the ends of justice will be sufficiently met if he is required to state, 'either forthwith, or if the Magistrate thinks fit, at the commencement of the next hearing of the case,' whether he wishes to cross-examine or not. It may happen that up to the time of a charge being framed the accused is not professionally represented, and it seems reasonable in such a case that he should be given until the next hearing to engage a pleader and decide what witness he will cross examine."

During the Debate in the Assembly a slight alteration has been made in the arrangement of the words, so as ordinarily to give the accused a *right* to postpone his decision as to the cross examination of the prosecution witnesses till the commencement of the next hearing of the case.

Scope of Section.—This section does not apply to proceedings under sec. 110. Though by section 117 the procedure prescribed for warrant cases is as nearly as possible to be followed in cases of security for good behaviour, it does not follow that that gives a right to the accused person to further cross examine the prosecution witnesses on entering on his defence, when he has once cross-examined them—35 Cal. 243; 1916 P. R. 1.

This section does not apply to an *inquiry* into a Sessions case prior to commitment. In such *inquiry* the accused has no right to cross-examine prosecution witnesses after the charge is framed—19 O. C. 239. See notes under section 208.

This section applies to summary trials (see sec 262), and therefore in the trial of a warrant case under the summary procedure, the accused is entitled to cross examine the prosecution witnesses after the evidence for the prosecution is closed—1 P L T 652

Claims to be tried —As to the import of this expression see 3 L B R 280 cited under sec 251

Cross examination —Before framing of charge —Although the proper time to recall and cross examine the witnesses for the prosecution is after the charge is read over to him and before he is called upon to make his defence still this section does not prohibit such cross examination *before* the charge is framed—21 Cal. 642 Opportunity should be given to the accused, if he so desires, to cross examine the prosecution witnesses even though the charge is not yet framed 8 C W N 838

The fact that the accused has cross examined the witnesses for the prosecution before the charge is framed, does not deprive him of the right given him by this section of recalling and cross examining those witnesses after the charge is framed—6 N W P H C R 284, 17 W. R 51, 27 Cal 370, 37 Cal 236, 20 Cal 469, 6 Bur L T 67, 2 Bom L R 542 Although some cross examination has taken place before charge, this section permits a further cross examination expressly directed to the case framed and embodied in the charge—21 Cal 642 Even when prosecution witnesses were cross examined by the accused before charge on the understanding that the accused would not require those witnesses to be recalled for further cross examination after the charge, still the Magistrate cannot refuse the application of the accused to recall and cross examine those witnesses after the charge is framed, but in such a case the Magistrate may direct that the accused should bear the expenses of recalling those witnesses—6 C W N 424

Accused's right to cross examine —According to the plain language of this section, the accused has a *right* to have the witnesses for the prosecution recalled and cross examined after charge—7 C L J 240, 4 Mad 130, 1 P L T 652; and it is not necessary for the accused to show that he has a reasonable ground for exercising the right of recalling and cross examining the prosecution witnesses. He is, *as a matter of right* entitled to cross examine—21 W R 29, 25 W R 32, and the Magistrate is not justified in refusing to recall the prosecution witnesses for cross examination, specially when the accused had not cross examined any witnesses before frame of charge—5 P L J 94 This right to recall and cross examine the witness is very different from the request made by the accused to summon a witness under sec 257—19 W R 53 Where there are several accused, each of the accused should be given an opportunity to cross examine. A Magistrate cannot refuse to allow the

further cross examination of the witnesses for the prosecution by one of the accused, on the ground that they had been cross examined by another—11 C. W. N. 621

The right referred to in this section is absolute and unqualified and is intended to apply only where the witnesses are still before the Court and before they have been discharged from further attendance. Under sec. 257, however, there is a discretion vested in the Court to resubmit the prosecution witnesses already examined, and where a witness has been allowed to depart under sec. 256 on the representation of the accused that he is not required, any further application to re-cross examine him must be deemed to fall under sec. 257—43 Mad. 411

Magistrate's duty to ask —Under this section, it is the duty of the Magistrate, after a charge has been framed, to require the accused to state whether he desires to cross-examine the prosecution witnesses already examined—27 Cal. 370, and the Magistrate ought not to discharge the witnesses for the prosecution until the accused person has exercised or waived his right of cross-examination—6 N. W. P. H. C. R. 284; 25 W. R. 48, 14 C. P. L. R. 137. Omission on the part of the Magistrate to ask the accused whether he wishes to cross-examine will invalidate the conviction, and the case will be retried from the point of framing the charge—1914 P. R. 11. Omission to ask the accused whether he wishes to recall and cross-examine the prosecution witnesses and the rejection of the accused's application on the ground that it was too late, would prejudice the accused in his trial—22 A. W. N. 5. In 16 Cr. L. J. 5 (Mad.) however it has been held that a failure to ask the accused whether he is willing to cross-examine is a mere irregularity and the conviction is not thereby vitiated.

Adjournment —An accused against whom a charge was framed without any previous intimation, when required by the Magistrate to state whether he wishes to cross-examine, and that he had no question at present but that time should be granted him for engaging a pleader and for cross-examining witnesses, it was held that the application for adjournment was reasonable under the circumstances, and ought to be granted—16 Cr. L. J. 736 (Mad.), 1916 P. W. R. 14, (1911) 2 M. W. N. 192. This is now made clear by the addition of the words "at the commencement of the next hearing of the case"

Mode of cross examination —There is nothing in this Code to prevent the accused from cross-examining each witness immediately after the examination in chief, and he should be allowed to do so, if he so wishes—U. B. R. (1897-1901) 74. See also notes under sec. 208.

If summons case tried as a warrant case —Where an inquiry commenced as a warrant case and the accused curtailed their cross-examina-

tion of prosecution witnesses under the impression that they would have a further opportunity of cross examining them, but no offence triable as a warrant case having been disclosed, the Magistrate closed the case and convicted the accused it was held that it was the duty of the Magistrate to allow the accused an opportunity of completing the cross examination before proceeding with the case—16 Cr L J 250 (Mad) Similarly, where a Magistrate while trying a summons case and a warrant case in one trial under the warrant case procedure, dismissed the complaint in respect of the warrant case and proceeded with the complaint in respect of the summons case, and, on being requested by the accused to recall the prosecution witnesses for their further cross examination, refused to do so, it was held that the refusal was illegal and the accused must certainly have been prejudiced by the same. The privilege conferred by this section is a substantial one and when denied it is for the prosecution to shew that there was no prejudice—39 Mad 503

Time of cross examination —[The following decisions were given under the Codes of 1861 and 1872 —If an accused person desires to recall and cross examine the witnesses for the prosecution, the time at which he should express such desire is when the charge is read over to him and *he is called upon to make his defence*—7 Cal 28, the most proper and convenient time for the purpose of cross examining the witnesses for the prosecution is at the commencement of the defence, before the witnesses for the defence are examined—22 W R 44 But the accused may recall and cross examine the witnesses for the prosecution at *any time while he is engaged in his defence*, and before the trial closes—6 N W P H C R 270 He can do so after the witnesses for the defence have been examined—4 Mad 130 If however, the accused refused to cross examine the witnesses when he was given such opportunity, and on such refusal, the prosecution witnesses were discharged, the accused was not entitled to have the witnesses resummoned for cross examination at a subsequent stage—2 All 253, 7 Cal 28]

Under the present law (1882 and 1898 codes) the accused must cross examine the witnesses for the prosecution *before* he enters upon his defence. But of course it is open to the Magistrate to allow cross examination at any subsequent stage, before the case has been closed—37 Cal 236 See sec 257 It all depends upon the particular circumstances of the case whether a belated application for recalling witnesses for cross examination should be granted or not. But it cannot be allowed after the case is closed—21 M L J 283

'Any remaining witnesses' —The words "any remaining witnesses" do not refer only to those witnesses who have been named by the

complainant under sec 252 (2), these words are wide enough to include any witness who according to the prosecution is able to support its case though he has not been summoned, provided he is not sprung upon the defence all on a sudden, and sufficient opportunity is given to the accused to prepare for the cross examination of such witness—11 Bom L R 1153

Discharge of prosecution witnesses —A Magistrate ought not of his own motion to discharge the witnesses for the prosecution until the accused person has exercised or waived his right of cross examination—6 N W P H C R 284, 25 W R 48 Witnesses for the prosecution should not be discharged until the Court has ascertained whether their cross examination after the charge will be desired—8 N L R 65 Where it becomes necessary to adjourn the hearing, the Magistrate should inquire of the accused if he desires to exercise his right of recalling the witnesses for the prosecution or consents to the discharge of all or any of them If the accused consents to their discharge, he is not entitled to have them resummoned as a matter of right—6 N W P H C R 284, 2 All 253 If the Magistrate did not so inquire, and there was no sufficient proof that the accused consented to the discharge, the accused would be entitled to have the witnesses, whom he desires to cross examine re summoned —6 N W P H C R 284

Expenses —This section gives the accused an absolute right to recall witnesses for cross examination at the expense of the prosecution, and it is not open to the Magistrate to order the accused to pay costs for recalling those witnesses—20 Cr L J 112 (Lah), 1907 P R 12 A Magistrate cannot refuse to summon a witness for the prosecution on the ground that fees for his attendance were not paid—4 C W N 351

Defence —After the cross examination is over, the accused should be called upon to enter upon his defence It is not a proper procedure to call upon the accused to enter upon his defence before he has cross examined the witnesses for the prosecution—8 N L R 65 Under the earlier Code, the accused could cross examine the prosecution witnesses, *while making his defence* See above

Adjournment for defence —According to the provisions of secs 256 and 257, the accused is entitled as a matter of right to apply for an adjournment, after a charge has been framed against him, to adduce evidence in his defence—1 C W

257 (1) If the accused, after he has entered upon his defence, lies to the Court, the Court may order that the accused shall be liable to pay the costs for cross-examination of any witness of the prosecution.

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of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing.

Provided that when the accused has cross-examined or had the opportunity of cross-examining any witness after the charge is framed, the attendance of such witness shall not be compelled under this section unless the Magistrate is satisfied that it is necessary for the purposes of justice.

(2) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purpose of the trial be deposited in Court.

"After he has entered up in his defence" — It is only after the accused has entered upon his defence that the Magistrate can in his discretion refuse the application of the accused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice—27 Cal. 370

Issue of process —The language of this section is imperative. A Magistrate has no discretion to refuse to issue process to compel the attendance of any witness unless he considers that the application should be refused on the grounds specified in the section—26 Bom. 418. The Magistrate must summon every witness named in the list. He cannot arbitrarily limit the number of witnesses to be examined—26 Bom. 418. Thus, where the accused put in a list of 72 witnesses, and the Magistrate ordered him to cite only 12 of them, it was held that the Magistrate's order was arbitrary and illegal—31 Mad 131

Once the Magistrate has issued summons, he is bound to assist the accused in enforcing the attendance of the witnesses. If the witnesses do not obey the summons, the Magistrate cannot refuse to issue a second summons—10 Cal 931, 1884 P. R. 28, 6 C. W. N. 548, Ratanlal 594, 4 All 53, 1922 P. L. R. 6, 9 C. W. N. ccxxix. It is the duty of the Court to see that the summonses and warrants are duly executed. If the witnesses do not attend, the accused can insist upon the court to issue further process. Where the witnesses cited by the accused failed to attend, and it appeared that the summonses were not duly executed, but the Magistrate proceeded to give judgment remarking that it was the

business of the accused to take suitable steps for bringing his witnesses before the Court, *held* that the conviction of the accused was illegal and must be set aside—19 A L J 945 When once a Court has issued a summons to a witness under this section, and the witness fails to appear, it is not justified in dispensing with the evidence of the witness on the ground that at the most he would merely support the accused in his statement—1922 P L R 5

Refusal to summon witnesses —An absolute right of cross-examination of the prosecution witnesses is not conferred by this section—20 Cal 469 The Magistrate can refuse to allow the accused to recall such witnesses for cross examination, if he considers that it is made for the purpose of vexation or delay or for defeating the ends of justice But it lies upon the party who thinks himself aggrieved to show that the ends of justice have been frustrated in consequence of the refusal to recall the prosecution witnesses for cross examination —20 Cal 469

Where the witnesses for the prosecution were subjected to a very lengthy and strict cross examination before the framing of charge, the Magistrate was right in declining to re-summon those witnesses, if he was of opinion that the application to re-summon the witnesses was made for vexation etc —Ratanlal 930, 20 Cal 469

What are not proper grounds for refusal —(1) The fact that the witnesses for the prosecution had been fully cross examined before is not by itself a ground of refusal to re-summon those witnesses, unless the Magistrate is clearly of opinion that the application is made for vexation or delay —4 C W N 241, 4 C W N 351 (2) A Magistrate cannot refuse to summon witnesses cited by the accused on the ground that they are implicated in the charge —15 W R 7 (3) The Magistrate cannot refuse to summon the defence witnesses on the ground that they will not be able to give any reliable evidence one way or the other —(1911) 2 M W N 192, because a Magistrate ought not to determine beforehand what credit he would give to their evidence —15 W R 15 (4) The Magistrate cannot refuse to summon more defence witnesses on the ground that the accused had stated before that he did not wish to examine any more witnesses —6 Cal 714

Recording grounds of refusal —If a Magistrate rejects the application for summoning the witnesses he should specify his reasons for such refusal If he fails to record reasons, the conviction and sentence will be set aside —4 C W N 241, 3 All 392, 15 A W N 40

It is a sufficient compliance with the requirements of this section, if the Magistrate states facts which led him irresistibly to the conclusion that the application was for no other purpose than that of vexation or delay or defeating the ends of justice, although he does not say expressly

that the application was made for that purpose—11 C W N 789
Where a Magistrate rejects an application after recording on it "too late", this is a sufficient compliance with this section—39 Cal 781

Examination of witnesses—A Magistrate cannot refuse to examine a witness who is present in Court, if he is requested by the accused to do so—4 Bom L R 461 Though it is competent for a Magistrate to decline to *summon* witnesses for the defence under this section, it is not competent for him to refuse to *examine* the defence witnesses, on the ground that their evidence is not necessary—14 Bom L R 360

Cross examination—The accused has got the right to cross examine prosecution witnesses once before the charge is framed, and secondly under section 256 after the charge is framed, and under section 257 the accused is given the third opportunity of cross examining the prosecution witnesses unless the Magistrate decides that the application for cross examination is vexatious—5 P L J 94

Where on a refusal by the Magistrate to resubmit the prosecution witnesses for cross examination, the accused cited those witnesses on his own behalf as defence witnesses, and then proceeded to cross examine them, but were disallowed by the Magistrate, it was held that the mere fact that the accused had been compelled to treat the witnesses for the prosecution as their own witnesses did not change their character, and that although the accused were compelled to obtain their attendance as witnesses for the *defence*, they were really *prosecution* witnesses and summoned under sec 257 for the purpose of cross examination, and the Magistrate was wrong in refusing to allow their cross examination—28 Cal 594, 1 C W N 19, (1922) M W N 120

Where an accused first obtained process for the attendance of a witness, but subsequently declined to examine him, whereupon the Court examined him under section 540, it was held that the witness could not be treated as a defence witness, and that the accused had the right to cross examine him—29 Cal 387

An accused may be allowed to cross examine witnesses called by his co accused, when the case of the co accused is adverse to his case—21 Cal 401 In 12 W R 75, however, it has been held that an accused's right to cross examine is limited to the witnesses called against him by the Crown. He cannot cross examine a witness called by a co-accused. If he wishes to avail himself of the evidence of a witness of a co-accused, he must examine (and not cross examine) him as a witness.

Expenses—An order for payment of costs of witnesses can be passed only under this section, when the application for recall of prosecution witnesses (or for calling his own witnesses) is made after the accused has entered upon his defence. But no payment of expenses can

be ordered under sec 256, when the accused wishes to recall prosecution witnesses for cross examination before he has entered upon his defence, such expenses must be defrayed by the Government—1907 P R 12, 20 Cr L J 112 (Lah)

Although the Magistrate can under this section require the accused to deposit in Court the expenses for the attendance of witnesses, still if the Magistrate has once allowed witnesses to be summoned without demanding expenses from the accused and if by any chance the witnesses summoned for a particular date have not been examined on that date the Magistrate has no power afterwards to say that on the next date of hearing, the witnesses shall not be summoned except on payment of their expenses by the accused—22 Cr L J 711 (Lah)

258 If in any case under this Chapter in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal

Acquittal
(2) If in any such case the Magistrate finds the accused guilty, he shall pass sentence upon him according to law

Conviction
(2) Where in any case under this Chapter the Magistrate does not proceed in accordance with the provisions of Section 349 or Section 562, he shall if he finds the accused guilty, pass sentence upon him according to law

Change—Subsection (2) has been amended by the Cr P C Amendment Act, 1923. The amendment is the same as that made in sec 245

Acquittal—An order of acquittal can be recorded only after a charge has been drawn up—22 W. R 75. But an omission to prepare a charge does not invalidate an order of acquittal—1 A W N 142. If however, a warrant case is tried as a summons case, and no charge is framed the acquittal amounts to a discharge under sec 253—6 A W N 260

After a charge is framed the Magistrate can pass no other order, except that of acquittal or conviction. He can not pass an order of discharge. Even if he discharges the accused the discharge would amount to acquittal—1883 P R 29, 38 Mad 585. So also, an order of dismissal of complaint would amount to an acquittal—5 C L R 359

The acquittal must be based on the finding that the accused is not guilty, the Magistrate cannot acquit the accused merely because the complainant, who was cited by the accused as the principal witness for the defence is not available, in such a case, the Magistrate should decide on the materials on the record — 1 A W N 38

Conviction —An accused must be convicted on the strength of the case made against him and not in consequence of his inability to put forward proof of his innocence —Ratanlal 5 If, however, a Magistrate feels reasonable doubt as to the guilt of the accused, he is bound to acquit him —Ratanlal 854

It is not necessary that the conviction or acquittal should be by the same Magistrate who drew up the charge — 3 Cal 495

Sentence —See notes under sec 245

259 When the proceedings have been instituted upon complaint, and upon any day fixed for the hearing of the case the complainant is absent, and the offence may be lawfully compounded, *or is not a cognisable offence*, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused

Change —The italicised words have been added by the Cr P C. Amendment Act, 1923

Scope of section —It is not in every warrant case that a Magistrate will be competent to pass an order of discharge on account of absence of complainant The warrant case must fall under this section—10 Cal 67 11 A W N 116 that is, the case must be instituted upon complaint and the offence must be compoundable without leave of Court If the case is not compoundable, no order of discharge can be passed —37 Bom 369 13 Bur L T 244 17 O C 18 Under the present section however, it is not always necessary that the offence must be compoundable If the offence is a non cognizable one an order of discharge may be passed

Principle of section —The primary reason of passing the order of discharge is, that the absence of the complainant raises a presumption that the complainant does not wish to proceed with the prosecution—12 Cr L J 184 (Sind)

Issue of summons —All warrant cases would be governed by this section, and the fact that a summons instead of a warrant has been

issued in the first instance, will not exclude that case from the operation of this section and bring it under Chapter XX—10 W R 31

Absence of complainant —If the complainant is absent, the Court is not bound to wait till the end of the day, in order to give the absent complainant an opportunity of appearing—7 Mad 356 But a slight delay in attending the Court, especially where on a day the Court sat earlier than usual, would not be a proper ground of discharge—Ratanlal 988

Discharge —The proper order is one of discharge, and not one of acquittal—37 Bom 369 So also, an order of "striking off" the case is not a proper order under this section—17 O C. 18 If a summons case and a warrant case are tried together, the proper order is one of discharge and not one of acquittal—41 Mad 727

Discretion of Magistrate —The Magistrate has a discretion to discharge the accused. But this discretion must be exercised with caution Before discharging under this section he should see whether there is a *prima facie* case against the accused, if there is such a case, the Magistrate should convict, if he discharges for the sole reason that the complainant is absent, his order is illegal—11 A W N 116, 12 Cr L J 184 (Sind)

If charge has been framed —The Magistrate can discharge under this section if no charge has been framed But if a charge has been framed, and the complainant is absent, it is not legal to discharge the accused without hearing the evidence for the defence The Magistrate ought to admit the accused to bail and enforce the attendance of the complainant—Ratanlal 524, Ratanlal 847 Once a charge has been framed, it is the duty of the trial Court to proceed with the trial, even in the absence of the complainant, and to convict or acquit the accused *on the merits*—22 Cr L J 312 (Lah).

Fresh complaint —The discharge under this section does not amount to an acquittal, and a Magistrate who has passed the order of discharge can re-hear the case on a fresh complaint—28 Mad 310, 29 Mad 126, 41 Mad 727, 18 M L J 56r, 28 Cal 652, 29 Cal 726

Further inquiry —A District Magistrate is competent under sec. 437 (now 436) to revive a case which has been dismissed by himself under this section and make it over to a subordinate Magistrate for trial—28 Cal 102

A District Magistrate can order further inquiry if he thinks that the discharge was improper—Ratanlal 988, Ratanlal 76, Ratanlal 145 He can order further inquiry even if no additional evidence is disclosed—10 Bom 131, 15 Cal 608, 9 All 52

CHAPTER XXII

OF SUMMARY TRIALS

Change of procedure from Chap XXI to Chap XXII —There is no section of the Code which expressly sanctions a change of procedure from a trial under Chap XXI to one under Chap XXII, but there is also no section which expressly prohibits such a change. The change of procedure is certainly not contemplated or sanctioned by the Code, and the Court must regard it as a mere irregularity which will not vitiate a trial unless it has occasioned a failure of justice. Thus in a case the Magistrate commenced the trial of the accused under Chap XXI for an offence which was triable by him summarily under Chap XXII. After framing the charge he continued the trial under Chap XXII without commencing it *ae novo* in the regular manner under Secs 255 and 256. It was held that this change of procedure was a mere irregularity, and where there was no failure of justice, the High Court could not interfere in revision—10 S. L. R. 185, 22 Mad 459. But see 26 C. W. N. 831 cited under Sec 260.

Power to try summarily

260 (1) Notwithstanding anything contained in this Code,—

- (a) the District Magistrate,
 - (b) any Magistrate of the first class specially empowered in this behalf by the Local Government, and
 - (c) any Bench of Magistrates invested with the powers of a Magistrate of the first class and especially empowered in this behalf by the Local Government,
- may, if he or they think fit, try in a summary way all or any of the following offences —
- (a) offences not punishable with death, transportation or imprisonment for a term exceeding six months,
 - (b) offences relating to weights and measures under Sections 264, 265 and 266 of the Indian Penal Code,
 - (c) hurt, under Section 323 of the same Code,

- (d) theft, under Sections 379, 380 or 381 of the same Code, where the value of the property stolen does not exceed fifty rupees ;
- (e) dishonest misappropriation of property under Section 403 of the same Code, where the value of the property misappropriated does not exceed fifty rupees ;
- (f) receiving or retaining stolen property under Section 411 of the same Code, where the value of such property does not exceed fifty rupees ;
- (g) assisting in the concealment or disposal of stolen property, under Section 414 of the same Code, where the value of such property does not exceed fifty rupees ;
- (h) mischief, under Section 427 of the same Code ;
- (i) house-trespass, under Section 448, and offences under Sections 451, 453, 454, 456 and 457 of the same Code ;
- (j) insult with intent to provoke a breach of the peace, under Section 504, and criminal intimidation, under Section 506, of the same Code ;
- (k) abetment of any of the foregoing offences ;
- (l) an attempt to commit any of the foregoing offences, when such attempt is an offence ;
- (m) offences under Section 20 of the Cattle-Trespass Act, 1871 ;

Provided that no case in which a Magistrate exercises the special powers conferred by Section 34 shall be tried in a summary way.

(2) When in the course of a summary trial it appears to the Magistrate or Bench that the case is one which is of a character which renders it undesirable that it should be tried summarily, the Magistrate or Bench shall recall any witnesses who may have been examined and proceed to re-hear the case in manner provided by this Code.

Responsibility of Magistrates —The responsibility thrown on Magistrates entrusted with summary powers is very great ; and the

responsibility of those who have to entrust them with such powers is equally great. Magistrates who are sufficiently alive to the responsibility entrusted to them will take care that the procedure or the record is not made more summary than what the law has laid down—21 All 189

Effect of transfer on summary powers—Where an Assistant Commissioner of a District who was before 14 going to England on furlough authorised to exercise summary powers in certain local area, was on his return from furlough posted to another local area as a first class Magistrate, it was held that he had no jurisdiction to exercise summary powers in the latter area—2 Cal 117

Magistrates empowered—The District Magistrate of Bangalore has no power to try European British subjects summarily under this section as his powers are confined to those conferred on him by the Declarations of the G. G. in Council and the power to try European British subjects summarily under this section is not included in such powers—39 Mad 91. Under the present law however all such restrictions will be removed.

Presidency Magistrate—The provisions of this chapter do not apply to trials before Presidency Magistrates—Ratanlal 539

Offences triable summarily—Whether an offence is to be tried summarily or not is to be determined by the nature of the complaint made and not by the facts disclosed by the evidence—2 C. L. R. 274 21 W. R. 89 22 W. R. 29. The facts stated in the complaint as well as the sworn testimony of the complainant may be taken into account in determining whether the offence is triable summarily or not—36 Cal 67. In 6 N. W. P. H. C. R. 254 16 Cal 715 and 1 Bom. L. R. 683 it has been held that the Magistrate is competent to dispose of a case summarily where the facts reported disclose an offence triable summarily, without reference to the particular charge pressed.

Modification of offences—Where a person is charged with a graver offence, the Magistrate ought not to cut down the offence to a less serious one at his own will in order to give himself jurisdiction to try it summarily—24 W. R. 48 27 Cal 983 29 Cal 409 11 Cal 236 27 C. W. N. 148 1 C. L. R. 434 1885 P. R. 5. Thus a charge of dacoity can not be treated as one of unlawful assembly, for the purpose of trying it summarily—21 W. R. 89 see also 23 W. R. 3, Ratanlal 670 1907 P. L. R. 11 6 Bur. I. T. 137, 24 W. R. 21. In 23 W. R. 19 however where the charge was one of rioting and the Magistrate treated the case as one of mischief and unlawful assembly, and tried it summarily, the High Court refused to interfere.

Reducing value of property —Where the value of the property stolen exceeded Rs 50, the Magistrate had no jurisdiction to reduce it to Rs 50, in order to give himself jurisdiction to try it summarily—22 W R 65

Splitting up of offences —No Magistrate is entitled to split up an offence into its component parts for the purpose of giving himself summary jurisdiction, thereby depriving the prisoner of his right of appeal—4 Cal 18

Joint charge of summary and non summary offences —Where an accused person is charged with offences not triable summarily along with offences triable summarily, the Magistrate cannot disregard the former offences, and proceed to try the case summarily—11 Cal 236, 1888 P R 5 *Contra*—10 All 55, where it has been held that the mere fact of the complainant charging the accused with summary offences along with non summary ones will not oust the summary jurisdiction of the Magistrate

Change of procedure in the midst of trial —Where a complaint was made of an offence not triable summarily, and the Magistrate commenced a regular inquiry, but afterwards finding that the offence committed was triable summarily, tried it summarily, it was held that the Magistrate had acted *bona fide* in the interests of justice, and the High Court refused to interfere—22 Mad 459 See also 10 S L R 185 cited at the beginning of this chapter But in 25 C W N 831 it was held that such a change of procedure in the midst of the trial was prejudicial to the accused, and that there should be a retrial

Summary trial of non summary offences—Effect —Where a Magistrate deliberately disregards the offence complained of which is an offence not triable summarily, and tries it summarily, his proceedings are absolutely void under sec 530 5 C W N 252, 22 W R 43

Instances of summary offences —Offences under sec 121, Indian Railways Act—22 A W N 24, offences under sec 65 (a), Stamp Act, for failure to give a receipt—1 Weir 906, proceedings under sec 84, Bombay Act VI of 1873 for recovery of Municipal Taxes—17 Bom 131, offences under the Companies Act for not filing the balance sheet with the Registrar of Joint Stock Companies—35 All 173, offences under sec 49 Bengal Abkari Act XXI of 1856, the confiscation provided in that section being merely a consequence of the conviction and not part of the punishment—3 Cal 366

Theft of property valued under fifty Rupees —Where a box containing fifty Rupees was stolen, and the price of the box was annas eight, the theft was of a property exceeding Rs 50 in value (i.e. Rs 50 + 8 annas) and could not be tried summarily—22 W R 65 Since a tenant

is entitled to the exclusive possession of the whole produce until it is divided under sec 71 of the Bengal Tenancy Ac, his complaint against the landlord for theft for having cut and carried away paddy worth Rs 88 of which the latter was entitled only to one half cannot be summarily tried by a Magistrate, as the value of the property in this case must be regarded as Rs 88 and not Rs 44 only—1 P L J 230

Offences not triable summarily—Offences under sec 2 of the Workmen's Breach of Contract Act—6 Bom L R 255, 2 L B R 163, 1902 U B R 3rd Quarter (W B C A) 1, 4 Mad 234, 2 Mad 235, 16 Bom 368, 27 Cal 131 33 Bom 22, 6 S L R 165 1912 P R 5 (*Contra*—11 All 262 and 43 All 281), offences under sec 6 of Act VII of 1851, for illegal demand of toll—22 W R 76, offences under the Press Act, *e.g.* omission to make a declaration—1889 P R 9, maintenance proceedings under sec 488—20 Cal 351 24 W R 61 offences under sec 9 Opium Act (punishable with one year's imprisonment)—4 Bur L T 271, cattle lifting—6 S L R 101 offences under sec 224 I P C—14 A W N 176, theft of property valued at more than Rs 50—22 W R 65, 14 N L R 190 1 P L J 230, a summary offence combined with a charge of previous conviction—2 Weir 324, 1 Bur S R 386

When summary trial undesirable or improper—A summary trial is undesirable in a complicated case where the conviction entails further consequences—Ratanlal 778 Ratanlal 784, 35 All 173, or in a case in which from the nature of the dispute and the plea taken by the accused it is apparent that complicated questions of right and title are involved—1 P L T 121, 3 P L T 347 A summary procedure is also undesirable where the trial lasts a long period and a local inquiry has to be made—25 W R 65 It is undesirable where the accused is a deaf and dumb person—8 Bom L R 849 It is improper where the Magistrate takes cognizance of the case from his own knowledge or suspicion, and holds the trial on inadequate materials 3 C W N cccxxx 1905 P L R 31, 25 W R 69 It is also undesirable in offences of a very serious nature, *e.g.* house breaking—14 N L R 190 It is improper where the charge is a serious one, and the trial goes on for a considerable time and a large number of witnesses and accused are examined—23 Bom L R 984 3 Lah L J 346

261 The Local Government may confer on any Bench of Magistrates invested with the powers of a Magistrate of the second or third class power to try summarily all or any of the following offences —

Power to invest Bench of Magistrate invested with less power

- | | |
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| <p>(a) offences against the Indian Penal Code, Sections 277, 278, 279, 285, 286, 289, 290, 292, 293, 294, 323, 334, 336, 341, 352, 426 and 447 ;</p> <p>(b) offences against Municipal Acts and the conservancy clauses of Police Acts which are punishable only with fine, or with imprisonment for a term not exceeding one month ;</p> <p>(c) abetment of any of the foregoing offences ;</p> <p>(d) an attempt to commit any of the foregoing offences, when such attempt is an offence.</p> | <p>(a) offences against the Indian Penal Code Sections 277, 278, 279, 285, 286, 289, 290, 292, 293, 294, 323, 334, 336, 341, 352, 426, 447 and 504 ;</p> <p>(b) offences against Municipal Acts, and the conservancy clauses of Police Acts which are punishable only with fine or with imprisonment for a term not exceeding one month <i>with or without fine</i> ;</p> <p>(c) abetment of any of the foregoing offences ;</p> <p>(d) an attempt to commit any of the foregoing offences, when such attempt is an offence.</p> |
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The italicised words at the end of clauses (a) and (b) have been added by the Cr. P. C. Amendment Act, 1923.

A Bench of Magistrates cannot try summarily any other offence except those mentioned in sec. 260 and this section—21 W. R. 12 ; 9 Cal. 96.

262. (1) In trials under this Chapter, the procedure prescribed for summons-cases shall be followed in summons-cases, and the procedure prescribed for warrant-cases shall be followed in warrant-cases, except as hereinafter mentioned.

(2) No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter.

Procedure for Summons and warrant-cases applicable.

Limit of imprisonment.

Procedure —The scanty procedure laid down in this Chapter should be strictly followed—22 W R 28 15 Mad 83, Magistrates should take care that the procedure and the record are not made more summary than the law has laid down—21 All 189 Thus, where the Magistrate without issuing process or making a record of the proceedings and without dismounting from the horse on which he was riding convicted and fined a man summarily for causing obstruction in a public way it was held that the procedure adopted by the Magistrate was illegal—15 Mad 83

In a summary trial of a warrant case the Magistrate must adopt the procedure laid down in Chapter XXI (except that he has not to frame a charge and is not bound to record the evidence of the witnesses) Therefore the provision of section 256 which gives the accused an absolute right of cross examination of the prosecution witnesses after they have been examined in chief must apply to a summary trial of warrant cases—1 P L T 632 The accused is entitled to have processes issued for compelling the attendance of the prosecution witnesses for cross examination—22 Cr L J 271 (Cr)

In a summary trial of a warrant case, though a charge need not be framed, the accused person cannot be called dilatory, if he delays to name his witnesses until he has heard the evidence for the prosecution and found that the Magistrate considers the evidence a substantial basis for charging him—Rural 768 In a warrant case tried summarily, the Magistrate ought to grant an adjournment if desired by the accused to enable him to summon the witnesses for the defence under sec 257, unless the Magistrate considers that the application is made for purposes of vexation or delay—5 L B R 20

In a summons case the Magistrate must not only state the charge to the accused but explain it to him—1 Bur S R 594 and the record must show that this has been done and must give the answer as nearly as possible in the words used—Ibid

Whenever the procedure of a summary trial is observed it must clearly appear on the face of the record that the case was dealt with summarily—20 W R 17

Sentence —In a summary case, a sentence of imprisonment for more than three months cannot be awarded if an adequate sentence cannot be passed the case should not be tried summarily—4 L B R 338 The limit of three months applies only to a substantive sentence a Magistrate is therefore competent to award a sentence of imprisonment in default of fine in addition to the three months' imprisonment—6 All 61

Fine of any amount may be imposed there is no limit to the amount of fine—35 All 173

Solitary imprisonment can also be awarded as part of the sentence—
6 All 83

A Magistrate is competent to take security bond under sec 106 on conviction in a summary trial—16 A W N 181

The High Court in revision can enhance the sentence passed in a summary trial to two years : i.e. the limit to which a Presidency Magistrate or Magistrate of the 1st class can pass sentence—*Bom H C Cr R* 30 7 1883

Compensation —Compensation may be awarded under sec 250 to the accused in a trial held summarily—11 Mad 142

263 In cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses or frame a formal charge, but he or they shall enter, in such form as the Local Government may direct, the following particulars —

Record in cases where there is no appeal

- (a) the serial number,
- (b) the date of the commission of the offence,
- (c) the date of the report or complaint
- (d) the name of the complainant (if any),
- (e) the name, parentage and residence of the accused,
- (f) the offence complained of and the offence (if any) proved, and in cases coming under clause (d), clause (e), clause (f) or clause (g) of sub section (1) of Section 260 the value of the property in respect of which the offence has been committed,
- (g) the plea of the accused and his examination (if any),
- (h) the finding, and, in the case of a conviction, a brief statement of the reasons therefor,
- (i) the sentence or other final order, and
- (j) the date on which the proceedings terminated

Record —Although the object of a summary procedure is to shorten the course of trial it is nevertheless incumbent on the Magistrate to put on record sufficient evidence to justify his order—27 Cal 450 10 C W N 79 Rattray 778

The record should be written by the Magistrate himself, there is no provision enabling him to delegate this duty to a clerk—6 Mad 396

The record should be made at the time of the trial and not afterwards. The admission of the accused should also be recorded at once—15 Mad 83

District Magistrates should satisfy themselves from time to time by examination of the records of summary trials that the law regarding such trials is properly observed and especially that Magistrates do not exceed their jurisdiction in this regard—*Cal G R & C O* p 16

Evidence—In a summary trial of a non appealable case the Magistrate need not record the evidence of witnesses in writing—25 A. W. N 143, Ratnaji 334. But this does not mean that this section excuses a Magistrate from *hearing* the evidence of witnesses. If the accused denies the charge the complainant and his witnesses must be examined and the case must be decided upon the effect of their evidence though the evidence need not be recorded—39 Cal 931

If at the commencement of the trial the Magistrate is unable to determine whether the proper sentence to be passed should be an appealable one or not, he must make a memorandum of the substance of the evidence of each witness as his examination proceeds. But if he can, at this stage, determine that the sentence will be, in any event, non appealable he need not record the evidence. If however he actually does so, the notes of the evidence form part of the record of the case and cannot be destroyed by him. Where the Magistrate had destroyed such record, the High Court in revision was unable to form an opinion on the propriety of the conviction and set it aside—48 Cal 280

Frame of charge—Although it is not necessary to frame a charge, still the accused must be called upon to answer to the particulars of the offence charged, and the Magistrate must specify the offence complained of in such a way as to give the accused notice of what is charged against him—16 C. W. N 696

Particulars of the offence—The record should show clearly the precise nature of the offence and should be complete in all particulars—2 A. W. N 59. The facts found by the Magistrate must show what offence has been committed by the accused—3 C. W. N 281, 1887 P. R. 7, 1889 P. R. 5. Further, the record however brief must show the necessary ingredients of the offence charged—3 L. B. R. 3

The offence charged the offence proved and the reasons for conviction must be recorded in such a manner as to enable the Revision Court to say aye or no from within the four corners of the record itself whether the offence charged is an offence in point of law, whether the offence proved is an offence in point of law, and whether the reasons of the conviction are good and sufficient—10 C. W. N 79

Examination and Plea of accused —The plea of the accused must be recorded, omission to record the plea will vitiate the conviction—9 C W N 1xxvi In all warrant cases there *must* be some examination of the accused as laid down in sec 342 Sec 263 does not give the Magistrate any discretion whether he will examine the accused or not The words 'it may' in clause (g) do not apply to warrant cases—41 Cal 143, 3 P. L. T. 347 Even the plea of the accused cannot take the place of the examination of the accused and render it unnecessary—3 P. L. T. 347

Reasons for conviction —The Magistrate, in a summary trial must in recording the reasons for the conviction state them in such a manner that the High Court may in revision judge whether there are sufficient materials before him to justify the conviction—19 A W N 81, 5 A W N 213 3 C W N 281 3 A W N 114 6 A W N 181 16 O C 357, 6 Cal 579 13 C P L R 17 1 L B R 208 3 P L T 499, 19 Cr L J 719 (Pat) Magistrates should set out so much of the reasons that have influenced them as to satisfy the accused that the Magistrate has considered each of the ingredients of the offence necessary in law for the conviction to which the Magistrate has proceeded—21 All 189 9 S L R 89, and while this should be recorded with brevity, the brevity should not be such as to tend to obscurity—21 All 189 Thus a judgment in a single line is not a judgment according to law—20 Cr L J 431 (Patna)

Failure to record a brief statement of reasons is fatal and the whole proceedings are illegal and liable to be set aside—6 C W N 40, 6 Cal 579, 18 Bom 97, 44 M L J 84, 1 P L T 716, 24 O C 293 13 C P L R 17 Even the defect cannot be cured by the Magistrate subsequently submitting the reasons to the High Court, when explanation was called for—9 C W N 1xxv In 6 C L R 273 however, it was held that the defect might be remedied by a subsequent statement by the Magistrate in some circumstances

264 (1) In every case tried summarily by a Magistrate or Bench in which an appeal lies, such Record in appealable cases Magistrate or Bench shall, before passing sentence, record a judgment embodying the substance of the evidence and also the particulars mentioned in section 263

(2) Such judgment shall be the only record in cases coming within this section

Record —The record of the trial must be made at the time of the

trial, and not subsequently prepared after the close of the trial, from memory or from rough notes—15 Mad 83

The judgment which is the only record in appealable cases, must be written by the Magistrate himself. He cannot delegate that duty to a clerk, nor can affix his signature to the record or judgment by a stamp—6 Mad. 396

Appealable cases —Where a Magistrate of the 1st class passes a sentence of imprisonment for one month and fine, his order is appealable. He cannot therefore make his record in the manner prescribed by sec. 263, but must act according to this section—2 C L R 511.

Substance of evidence —The Magistrate is not bound to record the substance of every separate deposition, but he is to state generally what is the substance of the witnesses' evidence—25 W R 6. The evidence should be recorded in such a way as to enable the Appellate Court to form an opinion whether the evidence is sufficient to support a conviction.—4 L B R 338, 1 All, 680

In a summary trial, a Magistrate made rough notes of the evidence which he subsequently copied and placed on the record, and destroyed the original notes. He also introduced into the case the facts of another case which he tried at the same time. It was held that the procedure adopted by the Magistrate was irregular and illegal, that the destruction of the original notes was tantamount to destroying the original record, with the result that there was no legal evidence on the record which an Appellate Court could go into—1 P. L. T 63

But the defect in recording the evidence is not always a sufficient ground for quashing the conviction. When the evidence is very imperfectly recorded, the Appellate Court may require the Lower Court to remedy the defect by properly recording the evidence in a fresh judgment after re-examining witnesses, or it may order a retrial with that view—1 All 680. In 20 W R 13, however, the conviction was set aside because the evidence was not sufficient to show whether the accused was rightly convicted or not. So also in 4 L B. R 338

265 (1) Records made under section 263 and judgments recorded under section 264 shall be written by the presiding officer, either in English or in the language of the Court, or, if the Court to which such presiding officer is immediately subordinate so directs, in such officer's mother-tongue.

Language of record
and judgment

269 (1) The Local Government may by order in the official Gazette, direct that the trial of all offences, or of any particular class of offences before any Court of Session, shall be by jury in any district, and may, with the like sanction, revoke or alter such order.

Local Government may order trials before Court of Session to be by jury.

(2) The Local Government, by like order, may also declare that, in the case of any district in which the trial of any offence is to be by jury, the trial of such offences shall, if the Judge, on application made to him or of his own motion so directs, be by jurors summoned from a special jury list, and may revoke or alter such order.

(3) When the accused is charged at the same trial with several offences of which some are and some are not triable by jury, he shall be tried by jury for such of those offences as are triable by jury, and by the Court of Session, with the aid of the jurors as assessors, for such of them as are not triable by jury.

'Class of offences' —The classes of offences referred to in this section are not restricted to the classification found in the Penal Code, *e.g.*, offences against the State, offences against public tranquillity etc., or to the classification found in this Code, *e.g.*, bailable offences, cognizable offences etc. Offences may be classified according to the persons who commit them, or according to the person or property against whom or which they are committed, or in regard to the particular occasion in connection with which they are committed—23 Mad 632.

Trial of jury case with assessors —If a jury-case is tried with the aid of assessors, and no objection is taken at the trial, the trial will stand good by virtue of sec. 536 (2)—23 Mad 632

Trial of assessor case by Jury —The trial by Jury of a case properly triable with assessors is not invalid on that ground—3 Cal 765 And unless the accused objects to such procedure before the verdict is delivered, he cannot be allowed to object with regard to it subsequently in appeal—33 Bom 423 Where an assessor case is tried by jury, the Judge cannot treat the verdict of the Jury as the opinion of assessors—25 Cal 655, so as to be able to concur with the opinion of the minority, if he disagrees with the opinion of the majority—4 C 1 R 405 If the Judge disagrees with the opinion of the majority, he must submit the case to the High Court under sec. 307—25 Cal 655

Joint trial of Jury-case and assessor case—Under sub section (3) an accused may be tried simultaneously at one trial by the jury for offences triable by jury, and by the Judge with the aid of the same jurors as assessors for offences triable with the aid of assessors—2 L. W. 933. But in such a trial, the Judge must always preserve a distinction between the two cases (the jury case and the assessor case) and must not treat the whole case as a jury case. He must separately record the verdict of the jury in the jury case, and must separately record the opinions of the jurors as assessors in the assessor case. If he disagrees with the verdict of the jury, he must not send the whole case to the High Court but must send only the jury case under sec. 307 and pass judgment with reference to the assessor case under sec. 309—9 Bom. L. R. 1057, Ratanlal 600. If in the course of such trial it appears that only one offence was committed, viz. an offence triable with assessors, and the Judge tries the case with the jury and disagrees with the verdict of the jury, he cannot send the case to the High Court under sec. 307, but should pass judgment under sec. 309 because he must treat the case as one triable with the aid of assessors, and he must treat the jurors as assessors—22 Mad. 15.

Again in such joint trial of two cases (a jury case and an assessor case) all persons who would serve as jurors in the jury case must serve as assessors in the assessor case. Where the Judge after taking the verdict of the jurors in the jury case, took only the opinion of two of them in the assessor case, it was held that the Magistrate's procedure was illegal, he must take the opinion of *all* the jurors as assessors—26 Mad. 598. Similarly where in such joint trial the Magistrate selected five gentlemen as jurors in the jury case, and two of them only were selected as assessors in the assessor case it was held that the Magistrate acted illegally, he ought to have taken all the five jurors as assessors in the assessor case—21 M. L. J. 520.

Secs. 269 and 526—Section 269 in no way limits the powers of transfer conferred on the High Court by sec. 526—10 S. L. R. 151.

Trial before Court of Session to be conducted by Public Prosecutor

270 In every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor.

The prosecution shall be conducted by the Public Prosecutor, if the complainant engages a counsel the Public Prosecutor may always avail himself of the services of such counsel and nothing so he does not deprive himself of the management of the case—11 B. H. C. R. 100. An Advocate of the High Court may appear on behalf of the prosecution in the

Court of Session and may conduct the prosecution without being specially empowered by the District Magistrate for that purpose—23 W R 14

But it is highly undesirable that the prosecution should be conducted by Police Officers—13 W R 18

The provisions of this section are merely directory, and therefore the omission to appoint a Public Prosecutor is merely an irregularity curable by sec 537—1887 P R 35

B—Commencement of Proceedings

271 (1) When the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court and explained to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried

(2) If the accused pleads guilty, the plea shall be recorded, and he may be convicted thereon

Charge shall be read and explained —Where the charge is merely read out to the accused but not explained the conviction will be quashed especially in cases of trial for murder—9 Mad 61, 3 Bom L R 489 The charge should be read and so explained to the accused that the Court is sure that he has understood the nature of the charge thoroughly, and it is then only that he should be called upon to plead—5 Cal 826, 2 Weir 336, 2 Weir 339, and the Judge ought to satisfy himself by interrogation of the accused if necessary that he fully understands the responsibility which he assumes in making a plea of guilty—20 O C 136

Every addition and alteration made in the charge has to be read over and explained to the accused—18 A L J 442

Record of charge —On the record of a trial in a Court of Session there should be the charge, which under sec 271 has been read over and explained to the accused, and when this is not so the record should contain an explanation of its absence. The fact that this is an omission covered by sec 537 is not a sufficient answer—18 A L J 442

Plea —No *alternative plea* —If there are two heads of a charge (e.g. if the accused is charged with the offence of culpable homicide or in the alternative with the offence of grievous hurt) the accused should not be called upon to plead in the alternative but to each of the heads of the charge separately. Where in such a case he pleaded guilty to the second

charge only (grievous hurt) and the Judge convicted him on that plea, the conviction was set aside—Ratanlal 327

Admission by pleader —The accused must plead guilty or not guilty by his own mouth, and not through his counsel or pleader—15 W R 42 6 Bom L R 861 Admission by pleader, especially by a pleader engaged by the Court for the accused and not by the accused himself, is not binding on him—2 Bom L R 751

Plea at the end of trial —After the accused has claimed to be tried, any confessional statement made by him should be laid before the jury, such an admission should not be taken as a plea of guilty upon which a Judge may record a finding without taking the verdict of the jury—2 Weir 334, 7 Bom L R 731

What is a sufficient Plea —The accused must distinctly and unequivocally admit the guilt otherwise it is not sufficient Where the accused instead of pleading guilty made a long rambling statement more or less admitting guilt it would be much safer if the Judge recorded a formal plea of 'not guilty' and proceed to try the accused in the ordinary way—5 A L J 157

The plea must distinctly admit every fact necessary to constitute the offence Thus where the accused merely admitted that he beat his wife and she died but he did not say whether he had any intention of causing such bodily injury as was likely to cause death, it was held that this was not a sufficient plea of guilty to a charge of culpable homicide because the intention is absent—2 Weir 336, 8 Bom L R 240 25 W R 23

If the prisoner pleads guilty but goes on to say that he did not commit the offence with which he is charged, this is tantamount to a denial of the guilt and does not amount to a plea of guilty—11 W R 53 Where the prisoner admitted that he had accompanied the dacoits for some distance, but returned back almost immediately and had nothing to do with the dacoity that afterwards followed it was held that such statement did not amount to a plea of guilty—7 W R 39

Where the plea of guilty is accompanied by qualifying statements such a plea is not properly speaking a plea of guilty Thus where the accused said that he killed his wife but that he did so under grave provocation (*e.g.* in consequence of discovering her in an act of adultery) such a statement is not a plea of guilty to murder—11 Cal 410 So also where the prisoner admitted the guilt, but said that he had committed the offence under the influence of certain persons mentioned, it was held that the plea was not one of guilty—6 A W N 66 Where the prisoner pleaded guilty but stated further that he committed the offence because he was subject to epileptic fits it was held that this was not a plea of guilty on which the accused could be properly convicted—Ratanlal 698

Where the prisoner admitted that he killed his wife, but stated that he was not in his right mind at the time, it was held that this was not a plea of guilty—5 N W P H C R 110

Partial plea of guilty —Where the accused is charged with having made two contradictory statements and he pleads guilty to one charge, that does not show that he pleads not guilty in respect of the other charge. It may be that both statements may be false. In such a case the prisoner ought not to be allowed to elect which statement he shall admit to be false—8 W R (Cr Let) 6

Plea of 'not guilty' —The accused can plead 'guilty' under sec 271 or he can claim to be tried under sec 272 or he can refuse to plead which is taken to be the same as claiming to be tried. The plea of 'not guilty' is not recognized by this Code—41 Cal 1072

Record of plea —If the accused pleads guilty, the plea should be recorded. Where no such plea appears on the record, the conviction is bad and must be set aside—5 M L T 75, 7 Cal 96, 5 A L J 157

If the statement is made by the accused in a foreign language it is not necessary that the plea must be recorded in the words of that language. It should be recorded in the language in which it is conveyed to the Court by the interpreter—5 Cal 826

Conviction on plea —If the accused pleads guilty before a Court of Session, his conviction is good even though there were no assessors—10 W R 43, 5 W R (Cr Let) 21. The word 'thereon' shows that the conviction must be upon the plea recorded before the Sessions Judge, and not on a confession made before the committing Magistrate—2 N W P H C R 479

If, however, the prisoner before the Court of Session has pleaded what in effect amounts to a plea of not guilty, the Judge is not justified in convicting him upon a confession made by him before the committing Magistrate—2 N W J H C R 479. Some corroborative evidence is necessary to warrant the Court of Session in acting upon a confession made before the committing Magistrate but retracted at the trial—18 A W N 22, 23 Bom 316

Plea upon one charge, conviction on another —Where an accused person pleads guilty to the specific offence with which he is charged he cannot on such plea be convicted of an offence other than that specifically charged—2 Weir 335. Thus, where the prisoner has pleaded guilty to the offence of murder he cannot be convicted of culpable homicide not amounting to murder—3 S L R 58, 2 Weir 335. Where the accused has pleaded guilty to a charge of culpable homicide, he cannot be convicted of the offence of grievous hurt for which he was not tried—Rattin 413

Conviction discretionary —It is discretionary with the Magistrate to accept or not the plea of guilty of the accused. He may or may not convict the accused on such plea. It is open to the Judge to go into the evidence and leave the case to the jury despite a plea of guilty—2 Weir 335, 20 O C 136. If the Judge does not think fit to convict the prisoner on the charge to which he has pleaded guilty, he should proceed to try him as if the plea had been one of 'not guilty' and he will have to take all the evidence in order to determine whether the prisoner has committed the offence to which he had pleaded guilty or any other offence with which he is charged—13 W R 55, 23 Mad 151. Where there are several co accused who are to be tried jointly, and one accused has pleaded guilty, the Judge has a discretion to decide either that the accused be convicted on such plea or that he should be put on his trial in spite of his plea of guilty. The proper procedure to follow in such a case is, that if the Judge convicts the accused on the plea of guilty, he should be removed from the dock in which case he can be called as a witness against the other accused, or that the Judge should put it on his record that he decides to put his accused on the trial in spite of his plea of guilty—20 O C 136, 23 Mad 151.

Where the Judge ought not to convict on plea —(1) Where the accused has pleaded guilty to one offence, but there is clear *prima facie* evidence of a different offence, the Judge ought not to convict the accused on his plea, but should proceed to try the case. Thus, where there is clear *prima facie* evidence of the offence of murder but the prisoner has pleaded guilty to a charge of culpable homicide not amounting to murder on grave and sudden provocation, the Judge ought not to convict him for the latter offence, but should proceed to try him for the former offence—(Ratanlal 4 to

(2) A plea of guilty should not be accepted in capital offences—1905 P. R 54, 19 Bom L R 356. In a case of murder, it has long been the practice of the Court not to accept the plea of guilty, for murder is a mixed question of fact and law. Unless the Court is perfectly satisfied that the accused knew exactly what was implied by his plea of guilty, the case should be tried, especially where the accused is an illiterate person—20 A L J 326, 20 A L J 669. In capital cases where there is doubt whether the persons who pleaded guilty to the charge of murder fully understood the meaning and effect of such plea, the Judge should proceed with the trial and take evidence—19 All 119. A person may plead that he hit somebody who thereby died, without necessarily admitting that he committed murder, for murder under the I P C requires a certain intention or certain knowledge. In such cases it is advisable not to convict solely upon the plea of the accused but to proceed to trial—5 Bom L R 240.

Conviction without charge —It is illegal to convict a person of an offence upon his own plea, when there is no formal charge in respect of that offence. Thus, where an accused person was charged with the offence of murder, and the charge was not proved, but the Court convicted her of the offence of concealment of birth which it considered was admitted by her in her examination by the Court, it was held that such conviction was illegal. A charge of concealment of birth should have been framed and the accused tried thereon—*Ratanlal* 386

Postponement of conviction —Where an accused person pleads guilty, the Court should record his confession and forthwith convict him thereon. If there are other persons being tried with him for the same offence, the Court should not postpone his conviction merely for the purpose of allowing the statements he may have made to be considered against the co accused. It is against the spirit of the law to postpone his conviction so that he may technically be said to be tried jointly for the same offence with the other co accused—30 All 540, 12 A L J 1239, 13 C W N 552. After a plea of guilty, a trial may be continued when it is thought necessary to ascertain the part taken by the accused in order to assess the punishment, but it is unfair to defer the conviction of the accused solely with the view of having his confession considered against his co-accused who have pleaded not guilty—23 All 53

Trial ends, if plea accepted —If the Court accepts the plea of guilty and convicts the accused, his trial is at an end and he may be called as a witness against or for any person who has been accused along with him—23 Mad 151. Where in a joint trial of several persons, one of the accused pleads guilty, his statement affecting himself and the other accused is not entitled to be considered under sec 30 of the Evidence Act, for the statement following the plea of guilty ceases to be the statement of a person jointly 'tried', because the trial ends so far as he is concerned, with his plea—22 Mad 491, 1911 P R 15, 15 Bom 66, 19 Bom 195, 7 Mad 102, 4 Cal 483, 2 C W N 749, 17 All 524, 22 All 445, 7 All 160

272 If the accused refuses to, or does not, plead, or if he claims to be tried, the Court shall proceed to choose jurors or assessors as hereinafter directed and to try the case

Refusal to plead or claim to be tried

Provided that, subject to the right of objection hereinafter mentioned, the same jury may try, or the same assessors may aid in the trial of, as many accused persons successively as the Court thinks fit.

Trial by same jury or assessors of several offenders in succession

'If the accused refuses to or does not plead' —The accused cannot be called upon to plead 'not guilty', such a plea is not recognised in the Code. The accused may either claim to be tried or refuse to plead which is taken to be the same as claiming to be tried—41 Cal. 1072. If he pleads 'not guilty' the Judge will proceed to try him.

If the accused makes no answer to the enquiry whether he is guilty or has any defence to make, it should be ascertained whether he is obstinately mute or dumb *as sufficient Do*. If he be found to be obstinately mute, the plea of 'not guilty' should be recorded, and the trial should proceed. If he is found to be dumb an enquiry should be made whether he is sane or insane or incapable of being tried. If found sane, a plea of 'not guilty' should be recorded, and the trial should proceed but if found to be insane the procedure laid down in Chapter XXXIV should be followed. Ratanlal 19.

Claims to be tried. —The actual trial does not begin until the charge has been read and the accused claims to be tried—15 Bom. 514, 25 Bom. 694. If the accused refuses to plead or claims to be tried, the Court must proceed to try the case, and where the trial is not by jury, it must be conducted with the aid of assessors—10 W. R. 43.

If there is no evidence. —In a case where the prisoner pleads not guilty and the Public Prosecutor does not offer evidence in support of the charge, the Judge ought to instruct the assessors that they are bound to find the prisoner not guilty—4 M. H. C. R. App. 39. Where there is nothing which can, if believed, amount to proof the case should not be put to the jury at all as a verdict of guilty (if the jury pronounces such verdict) cannot under such circumstances be sustained—16 W. R. 19.

"Same jury may try several persons successively" —By the term 'successively' is understood that one trial is to follow the other &c. on the conclusion of one trial the same jury may proceed to try the accused in the next case. The law does not contemplate that the two trials shall be conducted piecemeal in such a manner that at their conclusion the jury shall be called upon to decide at one and the same time upon two distinct classes of evidence, which though they have points in common, require careful discrimination as bearing upon the guilt or innocence of two sets of accused—6 Cal. 96.

273 (1) In trials before the High Court, when it appears to the High Court, at any time before the commencement of the trial of the person charged, that any charge or any portion thereof

Entry on unsustainable charges

is clearly unsustainable, the Judge may make on the charge an entry to that effect

(2) Such entry shall have the effect of staying proceedings upon the charge or portion of the charge as the case may be

Effect of entry

If the Court is clearly of opinion that no offence has been made out it is the duty of the Court to stay the proceedings by making an entry as contemplated by this section—21 Cal 97

Applications under this section should be disposed of by the High Court in its original criminal jurisdiction—9 Cal 397

C—Choosing a Jury

274 (1) In trials before the High Court the Jury shall consist of nine persons

(2) In trials by jury before the Court of Session the jury shall consist of such uneven number, not being less than five or more than nine, as the Local Government, by order applicable to any particular district or to any particular class of offences in that district, may direct

Provided that where any accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons and, if practicable, of nine persons

The word 'five' has been substituted for 'three' and the proviso has been added, by the Criminal Law Amendment Act, 1923 "In the Sessions Court the number should be any uneven number from five to nine which the Local Government may select. Thus, five should be substituted for three in section 274, as the minimum number of jury in a Sessions Court. In murder cases, before the Sessions Court, we are of opinion that the number of jury should if practicable be nine'—*Report of the Racial Distinctions Committee*, Para 25

The number fixed by the Local Government must be strictly adhered to. Where the Local Government has fixed the number at five, a trial by jury consisting of seven members is *ultra vires*—26 All 211

275 (1) In a trial by jury before the High Court or Court of Session of a person who has been found under the provisions of this Code to be an European or Indian British subject,

Jury for trial of European and Indian British subjects and others

a majority of the jury shall, if such person before the first juror is called and accepted so requires, consist, in the case of an European British subject, of persons who are Europeans or Americans and, in the case of an Indian British subjects, of Indians

(2) *In any such trial by jury of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American, a majority of the jury shall, if practicable and if such European or American before the first juror is called and accepted so requires, consist of persons who are Europeans or Americans*

This section has been thoroughly redrafted by the Criminal Law Amendment Act 1923. Prior to the amendment it stood as follows —

‘In a trial by jury before the Court of Session of a person not being an European or an American, a majority of the jury shall if he so desires, consist of persons who are neither Europeans nor Americans’

The reason of the amendment has been thus stated ‘The most difficult question for the Committee to decide is that of trial by jury of European British subjects. This is the point on which non official European opinion is most emphatic, namely that it is essential that a mixed jury should be retained. We have decided accordingly that the mixed jury should remain both in the High Court and in the Sessions Court in all cases which are to be tried by jury under our proposals, subject however to certain provisions and safeguards namely — The same law as to the composition of the jury shall apply to Indians as to Europeans, that is to say, the majority of the jury, if an Indian accused so desires shall consist of persons who are not Europeans or Americans. This is already the law in Sessions Courts, and section 275 should be so amended as to make it apply to the High Court also — *Report of the Racial Distinctions Committee, Para 25*

A Native Christian is not entitled to say that he must be tried by a Christian jury. But he can like any other accused, object to the jurors individually.—I W R 2

276 The jurors shall be chosen by lot from the persons summoned to act as such, in such manner as the High Court may from

Jurors to be chosen by lot

time to time by rule direct

Provided that—

first, pending the issue under this section of rules for any Court, the practice now prevailing in such Court in respect to the choosing of jurors shall be followed;

Existing practice maintained;

secondly, in case of a deficiency of persons summoned the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present;

persons not summoned when eligible.

thirdly, in a trial before any High Court in the town which is the usual place of sitting of such High Court,

trial before special jurors.

- (a) if the accused person is charged with having committed an offence punishable with death, or
- (b) if in any other case a Judge of the High Court so directs, the jurors shall, be chosen from the special jury list hereinafter prescribed, and

fourthly, in any district for which Local Government has declared that the trial of certain offences may be by special jury, the jurors shall, in any case in which the Judge so directs, be chosen from the special jury list prescribed in Section 325.

Change —In the *third* proviso, the words "in a trial.....sitting of such High Court" have been substituted for the words "in the presidency towns," so as to include those High Courts which are not situated in Presidency Towns, *e.g.* the High Courts at Allahabad, Lahore, Rangoon. Similar amendments have been made in sections 315 and 316

'Chosen by lot' —The object of the Legislature in choosing a jury by lot is to render impossible any intentional selection of jurors to try a particular case, and the accused is entitled to a strict observance of the provisions contained in this section and sec 279. Irregularities in choosing the jury by lot affect the constitution of the Court, and cannot be cured by sec 537—7 C. W. N. 188, 33 All 385. In 8 Cal 739 and 1917 M. W. N. 1, however, where the Judge himself selected the jurors, instead of choosing them by lot, it was held that such a procedure was merely irregular and the verdict would not be interfered with if no prejudice was caused to the accused, and no objection was taken to such a procedure at the trial.

The persons who are to be chosen by lot ought to be selected from the entire number of persons summoned to act as jurors, and the selection ought to be made from one box—1 Bom 462

'In order to nominate a jury for the trial of any prisoner or other person to be tried by jury, a Sessions Judge shall cause to be put together in one box, cards or pieces of paper containing the names of all the persons summoned to attend, except such of the said persons as shall have been excused by the Sessions Judge from serving on that day in consequence of the r having served as jurors on the previous day or for any other cause. Such cards or pieces of paper shall be as nearly as may be, of equal size, and shall bear the name of one person summoned to attend. The Sessions Judge shall then in open Court, draw or cause to be drawn, out of the said box, one after another as many of the said cards or pieces of paper as may represent the number of jurors required to try the case and if any of the jurors whose names shall be so drawn shall not appear or if any be objected to and the objection be allowed, then such further number shall be drawn as may be necessary to complete the number of jurors required for the case' — Cal G R. & C O p 19

Second proviso —If the Judge is unable to obtain a panel in the manner provided by the second proviso, his duty is to postpone the trial and to summon jurors under the provisions of sec 326 (2)—7 C W N 188

277 (1) As each juror is chosen, his name shall be called aloud, and, upon his appearance, the accused shall be asked if he objects to be tried by such juror.

Names of jurors to be called

called aloud, and, upon his appearance, the accused shall be asked if he objects

to be tried by such juror.

(2) Objection may then be taken to such juror by the accused or by the prosecutor, and the grounds of objection shall be stated

Objection to jurors

Provided that, in the High Court, objections without grounds stated shall be allowed to the number of eight on behalf of the Crown and eight on behalf of the person or all the persons charged

Objection without grounds stated

Where the Judge instead of hearing and deciding objections, proceeded to exempt some of the persons present merely on their own representation, the procedure was irregular and the irregularity could not be cured by sec 537—7 C W N 188

278 Any objection taken to a juror on any of the following grounds, if made out to the satisfaction of the Court, shall be allowed

Grounds of objection

- (a) some presumed or actual partiality in the juror ,
- (b) some personal grounds, such as alienage, deficiency in the qualification required by any law or rule having the force of law for the time being in force, or being under the age of twenty one or above the age of sixty years ,
- (c) his having by habit of religious vows relinquished all care of worldly affairs ,
- (d) his holding any office in or under the Court ,
- (e) his executing any duties of police or being entrusted with police duties ,
- (f) his having been convicted of any offence which, in the opinion of the Court, renders him unfit to serve on the jury ,
- (g) his inability to understand the language in which the evidence is given, or when such evidence is interpreted the language in which it is interpreted ,
- (h) any other circumstances which, in the opinion of the Court, renders him improper as a juror

Clause (c) —The allowing of an objection under clause (c) is within the discretion of the Court , the Court is not bound to allow such an objection, but it ought not to treat it as frivolous—16 W R 66

Clause (d) —The fact that a person is a clerk in the office of the Magistrate of the District is not sufficient to disqualify him from sitting as a juror—7 Cal 42

279 (1) Every objection taken to a juror shall be decided by the Court and such decision shall be recorded and be final

Decision of the objection

(2) If the objection is allowed, the place of such juror shall be supplied by any other juror attending in obedience to a summons and chosen in manner provided by Section

Supply of place of jurors against whom objection allowed

276, or if there is no such other juror present, then by any

other person present in the Court whose name is on the list of jurors, or whom the Court considers a proper person to serve on the jury :

Provided that no objection to such juror or other person is taken under Section 278 and allowed.

280 (1) When the jurors have been chosen, they shall appoint one of their number to be
Foreman of Jury. foreman.

(2) The foreman shall preside in the debates of the jury, deliver the verdict of the jury, and ask any information from the Court that is required by the jury or any of the jurors.

(3) If a majority of the jury do not, within such time as the Judge thinks reasonable, agree in the appointment of a foreman, he shall be appointed by the Court.

281. When the foreman has been appointed, the jurors shall be sworn under the Indian Oaths
Swearing of Jurors. Act, 1873.

282. (1) If, in the course of a trial by jury at any time before the return of the verdict,
Procedure when Juror ceases to attend, etc. any juror, from any sufficient cause, is prevented from attending throughout the trial, or if any juror absents himself and it is not practicable to enforce his attendance, or if it appears that any juror is unable to understand the language in which the evidence is given or, when such evidence is interpreted, the language in which it is interpreted, a new juror shall be added, or the jury shall be discharged and a new jury chosen.

(2) In each of such cases the trial shall commence anew.

"Unable to understand language" —Where the juror was deaf and blind, he was held to be unable to understand the language of the trial, and was discharged, and the case was tried *de novo*—19 Mad. 375

Absence of witness .—The Judge can discharge the jury owing to absence of a juror but he cannot do so owing to absence of a witness—4 Bom. L. R. 939.

Trial shall commence anew—Where a juror was discharged and replaced by another, but the trial was not commenced anew, but the Judge called the witnesses who had been examined, read out their statements to them which they admitted to be correct and the trial proceeded, it was held that there was no valid trial—36 All 481

But the trial which becomes null and void owing to the incompetence of a juror under this section is not null and void for all purposes. Thus if a witness has given false evidence during such trial, he can be prosecuted under sec 193 I P C. The nullity of the trial will not affect the liability of the witness for the prosecution for perjury—19 Mad 375

283 The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar.

Discharge of jury in case of sickness of prisoners.

D.—Choosing Assessors.

284 When the trial is to be held with the aid of assessors, *not less than three and, if practicable, four* shall be chosen from the persons summoned to act as such

Assessors how chosen.

Change—The italicised words have been substituted for the words "two or more" by the Criminal Law Amendment Act, 1923. "We add the further recommendation that in all cases triable with the aid of assessors, there shall be, if possible, four, and in any case not less than three, assessors"—*Report of the Racial Distinctions Committee*, Para 26

Choosing assessors—The real object of appointing assessors is to assist the Court, and the discussion and statement of points by a Judge sitting with assessors cannot be said to be otherwise than in furtherance of the object of getting the best assistance for the proper adjudication of the case—15 W R 25

The choice of jurors is by lot, but the choice of assessors is entirely with the Judge, who in the exercise of this power should pay every consideration to any reasonable objection raised, although the law does not, as in the case of jurors, provide for objections being taken to an assessor. In the selection of assessors, regard must be had to the nature of the case, to the person tried, and to the public feeling excited. They ought not to be pleaders nor young men fresh from College and devoid of experience. They ought to be persons of in-

dependent conditions in life men of judgment and experience—23 W R 35

Though there is no express provision for objecting to the selection of an assessor, still there is no reason why an objection of presumed or actual partiality should not be allowed, particularly when it is urged at the time of selection of the assessor—3 P L T 32

'From the persons summoned' —The assessors must be chosen from the persons summoned to act as such. The Judge is not competent to select any one to act as an assessor who has not been summoned under sec 326 or 327. Where out of several persons summoned the Judge selected only one, and he selected two other persons at random from the persons present in Court, it was held that the trial was bad, as it was practically conducted with one assessor only—14 A W. N. 207, 35 All 570, 3 P L J 141. Where in the absence of assessors duly summoned the Judge appointed the Nazir of the Court to act as assessor the trial was held to be illegal, as the Nazir was not duly summoned, and in choosing assessors there is no provision corresponding to the second proviso to sec 267 (in choosing jurors)—13 O C 337. But where a person was summoned to serve as an assessor on a particular date in a particular case and he failed to appear in Court on that date but appeared on a subsequent day when another trial had to commence, and he was selected to act as an assessor in that trial, his selection would not be improper—17 Cr L J 17 (All)

Number of assessors —Under the present section, there must be at least three assessors. A trial commencing with the aid of *one* assessor is not a legal trial, and sec 537 cannot cure the defect—25 Bom 694, 15 Bom 514. If there were two assessors but one of them was deaf and blind there was properly speaking only one assessor and the trial was invalid—21 ALL 106, 2 Weir 340.

Trial without assessors —The trial will be invalid if a portion of the trial which consists in the taking of additional evidence takes place after the discharge of the assessors—15 All 136.

284 A. (1) *In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European or Indian British subject, if the European or Indian British subject accused, or, where there are several European British subjects accused or several Indian British subjects accused, all of them jointly, before the first assessor is*

Assessors for trial of European and Indian British subjects and others

Trial still commenced—Where a juror was discharged and replaced by another, but the trial was not commenced anew, but the Judge called the witnesses who had been examined, read out their statements to them which they admitted to be correct and the trial proceeded, it was held that there was no valid trial—36 All 481

But the trial which becomes null and void owing to the incompetence of a juror under this section is not null and void for all purposes. Thus if a witness has given false evidence during such trial, he can be prosecuted under sec. 193 I. P. C. The nullity of the trial will not affect the liability of the witness for the prosecution for perjury—19 Mad 375.

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From the persons summoned—The assessors must be chosen from the persons summoned to act as such. The Judge is not competent to select any one to act as an assessor who has not been summoned under sec. 326 or 327. Where out of several persons summoned the Judge selected only one, and he selected two other persons at random from the persons present in Court, it was held that the trial was bad, as it was practically conducted with one assessor only—14 A. W. N. 277; 35 All. 570, 3 P. L. J. 141. Where in the absence of assessors duly summoned the Judge appointed the *Nazir* of the Court to act as assessor the trial was held to be illegal, as the *Nazir* was not duly summoned, and in choosing assessors there is no provision corresponding to the second proviso to sec. 267 (in choosing jurors)—13 O. C. 337. But where a person was summoned to serve as an assessor on a particular date in a particular case and he failed to appear in Court on that date but appeared on a subsequent day when another trial had to commence, and he was selected to act as an assessor in that trial, his selection would not be improper—17 Cr. L. J. 17 (All).

Number of assessors—Under the present section, there must be at least three assessors. A trial commencing with the aid of *one* assessor is not a legal trial, and sec. 537 cannot cure the defect—25 Bom. 694; 15 Bom. 514. If there were two assessors but one of them was deaf and blind, there was properly speaking only one assessor and the trial was invalid—21 ALL. 106, 2 Weir 340.

Trial without assessors—The trial will be invalid if a portion of the trial which consists in the taking of additional evidence takes place after the discharge of the assessors—15 All. 136.

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Assessors for trial of European and Indian British subjects and others.

chosen so require, all the assessors shall, in the case of European British subjects, be persons who are Europeans or Americans, or, in the case of Indian British subjects, be Indians.

(2, In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American, all the assessors shall, if practicable and if such European or American before the first assessor is chosen so requires, be persons who are Europeans or Americans.

This section has been newly added by the Criminal Law Amendment Act, 1923. Under this section, Indians and Europeans can claim to be tried before their own countrymen as assessors. "In any district in which for any class of offence Indians are normally triable in a Court of Session with the aid of assessors, and in which no racial considerations are involved, the accused whether Indian or European shall be tried with assessors, who if the accused so claims, shall all be of the nationality of the accused"—*Report of the Racial Distinctions Committee*, Para 26.

Subsection (2) embodies the old section 460 with certain modifications

The accused, if he intends to avail himself of the provisions of this section must make a claim to the privilege conferred by it; failure to make a claim will amount to waiver—1912 P. R. 6.

285. (1) If in the course of a trial with the aid of assessors, at any time before the finding, any assessor is, from any sufficient cause, prevented from attending throughout the trial, or absents himself, and it is not practicable to enforce his attendance, the trial shall proceed with the aid of the other assessor or assessors.

Procedure when assessor is unable to attend.

(2) If all the assessors are prevented from attending, or absent themselves, the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors.

Absence of assessors :—This section contemplates that at least one assessor must attend continuously throughout the trial—6 C. W. N. 715; 24 Mad 523. Therefore, where in a Sessions trial beginning with three assessors, one of the assessors died at an early stage of the proceedings

and later on another assessor became too ill to be present, and the third was absent before the pleader for the defence addressed the Court, it was held that the trial was a nullity—13 All 337

An assessor who is absent during a part of the trial can not be allowed to resume his seat as assessor, once he is absent he ceases to occupy the position of an assessor. Where such an assessor was allowed to resume his seat, and the evidence recorded in his absence was read over to him, and he gave his opinion just like the other assessors, it was held that the procedure was not in accordance with law. His opinion ought not to have been taken—8 C P L R 9, 6 C W N 715 Ratanlal 695. In 24 Mad 523, however, it was held that such a procedure is merely irregular but not illegal. Though the proper course would have been to proceed with the other assessor alone, and to accept his opinion only, still the fact that the absent assessor was allowed to resume his seat and take part in the trial and give opinion will not vitiate the opinion of another assessor which was validly given. The assessors merely assist the Court but do not form part of the tribunal which finally decides the case and the assessors unlike the jury give their opinions separately and not as members of a body. And the invalidity of the opinion of one does not affect the validity of the opinion of the other.

If assessor is an interested person —Where in the course of a trial it is found that one of the assessors is interested in the trial, and is unfit to sit as an assessor, there is no provision of the law to meet such a contingency. In such a case the proper course is to refer the case to the High Court to set aside the order appointing the incompetent assessor and all subsequent proceedings in the trial. Then the Sessions Judge will be asked by the High Court to choose another assessor and proceed with the trial *de novo*—1912 M W N 378

DD—Joint Trials

285 A *In any case in which an European or American is accused jointly with a person not being an European or American or an Indian British subject is accused jointly with a person not being an Indian, and such European Indian British Subject or American is committed for trial before a Court of Session, he and such other person may be tried together, but if he requires to be tried in accordance with the provisions of Section 275 or Section 284 A and is so tried, and*

the other person accused requires to be tried separately, such other person shall be tried separately in accordance with the provisions of this Chapter

This section has been newly added by the Criminal Law Amendment Act, 1923. It provides that in cases in which Indians and Europeans are sought to be tried jointly, they can claim to be tried separately before jurors or assessors who are their own countrymen.

E—Trial to close of cases for Prosecution and Defence

286 (1) When the jurors or assessors have been chosen

Opening case for prosecution the prosecutor shall open his case by reading from the Indian Penal Code or other law the description of the offence charged and stating shortly by what evidence he expects to prove the guilt of the accused

(2) The prosecutor shall then examine his witnesses

Trial cannot be postponed—After the jurors have been chosen, the prosecutor shall open his case and the trial cannot be postponed to enable the prosecutor to examine a witness by commission—19 Cal 113

Examination of witnesses—The object of a prosecution is not to secure a conviction but to see that justice be done. The prosecutor is bound to call all the witnesses who prove their connection with the transaction in question, and who also must be able to give important information. If such witnesses are not produced without sufficient reason being shewn, the Court may properly draw an inference adverse to the prosecution—8 Cal 121, 7 All 904, 1 P L T 161, 3 S L R 200. All the persons alleged or known to have knowledge of the facts ought to be brought before the Court to be examined. The fact that certain witnesses were examined by the committing Magistrate against the express desire of the police officer conducting the prosecution is no ground for not calling them—10 Cal 1000. All the witnesses who were present at the scene of the crime must be called by the prosecution even if they give contradictory versions so that the jury may draw their own conclusion from the depositions—Ratanlal 581, 1 P L T 491, 42 Cal 412, and it is not a sufficient reason not to call such a witness, simply because the opinion he has formed shows an unconscious bias on his part—9 C W 438. The prosecutor is not free to choose how much evidence he will bring before the Court. He is bound to produce all the evidence in his power directly bearing upon the charge. It is his duty to call all wit-

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All the witnesses sent up by the committing Magistrate must be examined, and the Sessions Judge is not competent to pick and choose among them. It is the duty of the Court to examine all such witnesses, unless it has good and sufficient reason to believe that the witness came to the Court house with a predetermined intention of giving false evidence—15 All 6, 14 Cal 24, 7 All 904, 2 Weir 378. In 14 All 521, however, it has been held that the prosecution is not bound to examine a witness examined before the committing Magistrate, except when the committing Magistrate has stated in his order of commitment that he has been influenced by that particular witness in ordering the committal. No further duty is imposed on the prosecution than that of having in attendance every witness examined before the committing Magistrate, so that the witness may be examined or not by the defence counsel as he chooses.

If the defence witnesses who have been summoned by the committing Magistrate to appear before the Sessions Court, fail to appear, the Sessions Judge is bound to enforce their attendance. Where the Sessions Judge refused to summon them on the ground that the application for summons has been made at a late stage, and proceeded with the trial, the High Court on appeal set aside the trial—47 Cal 758.

When the Public Prosecutor does not call a witness examined before the committing Magistrate, on the ground that he will not speak the truth, he should explain to the Court that this is the reason, and should tender him for cross examination. In the absence of any such explanation or other reasonable grounds apparent on the face of the proceedings, inferences unfavourable to the prosecution will be drawn from non production of witness—7 All 904.

When there is no ground for disbelieving the witnesses, all the witnesses must be examined, and the trial cannot be stopped, or no final opinion as to the falsehood or insufficiency of the prosecution evidence ought to be arrived at, until all the witnesses have been examined.

the other person accused requires to be tried separately, such other person shall be tried separately in accordance with the provisions of this Chapter

This section has been newly added by the Criminal Law Amendment Act, 1923. It provides that in cases in which Indians and Europeans are sought to be tried jointly, they can claim to be tried separately before jurors or assessors who are their own countrymen.

L—Trial to close of cases for Prosecution and Defence

286 (1) When the jurors or assessors have been chosen the prosecutor shall open his case by reading from the Indian Penal Code or other law the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused.

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Thus, where after the examination of some of the witnesses the Judge asked the jury whether they wished to hear any more evidence and they stated that they did not believe the evidence and wished to stop the case and the Judge recorded a verdict of acquittal, it was held that the procedure was wrong. All the remaining witnesses ought to have been examined before any verdict was recorded—20 *Mad* 445

The evidence must be taken *in the presence of the accused*. It is an irregular procedure to examine witnesses in the absence of the accused and then to read over to the accused the evidence recorded in his absence, the accused being however allowed to cross examine the witnesses. Such a procedure prejudices the accused in his cross examination and defence—5 *C P L R* 33

Witnesses not examined before the committing Magistrate—The prosecution cannot demand, as of right, that any witness not examined in the preliminary inquiry should be called and examined at the trial. But the Court, if it considers necessary, may call and examine him—14 *All* 252. But the mere fact that a witness has not been examined before a committing Magistrate is no ground for refusing to take the evidence of such witness. There is nothing in the Code which restricts the examination at the trial only to the witnesses examined before the committing Magistrate. But the prosecutor should, as a matter of justice and fairness to the accused, state in his opening address the names of such witnesses—1889 *P R* 1

Cross Examination—As a rule the cross examination of a witness should take place after his examination in chief, and cannot be postponed. There is no provision of law which authorises the Judge to allow all the prosecution witnesses to be examined at once and to permit the cross examination to be reserved to a subsequent date—2 *Weir* 381. But though the accused is not entitled to such postponement as of right, still there is no reason why the Sessions Judge should refuse an application for such postponement where the application was a reasonable one under the circumstances of the case—41 *Cal* 299

A Sessions Judge is not justified in stopping the cross examination and turning the witness out of Court because he is of opinion that the witness is not speaking the truth and no reliance can be placed on the deposition of a witness whose cross examination has been stopped—20 *A W N* 549

Cross Examination of a witness not examined in chief—The ordinary practice in properly constituted Courts is that where a witness for the prosecution is not examined by the Crown, he is placed in the

witness box in order that the defence may have an opportunity of cross-examining him—5 Cal 614, 11 Bom. L. R. 1162; 15 W. R. 64, 14 All 521, 14 Cal. 245. But there is no provision in the Code analogous to English practice, entitling the prisoner, as a matter of right, to have a witness for the prosecution who is not called, put into the box for cross examination, and the disallowing of it is no error in law—5 B. H. C. R. 85, 14 Cal. 245, 14 All 521.

287. The examination of the accused duly recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence.

Examination of accused before Magistrate to be evidence

'The examination of the accused'—This section contemplates an examination of the accused, although sec 209 does not make it imperative on the committing Magistrate to examine the accused—Ratnaloo

The examination of the accused recorded by the Magistrate should be put in before the accused is called on to enter on his defence—2 Weir 361, Cal. G. R. & C. O. p. 23.

The *whole* of the examination should be read out—4 M. H. C. R. App. 4; 8 W. R. 38, 9 M. L. T. 316. Where the prisoner had made two statements before the Magistrate, the one amounting to a confession of the guilt and the other to a denial thereof, the trial Court ought to consider both the statements and their relative credibility—to B. L. R. 332, 18 All 78.

This section permits a previous statement of the accused to be read as a part of the case for the prosecution only so far as such statement refers to the offence for which the accused is being tried, and not so far as it relates to a previous conviction. The portion as to previous conviction cannot be read out to the jury or assessors under sec 310 until they have given their verdict or opinion—6 P. L. J. 706.

'Duly recorded'—Where the accused was examined about a confession which was not admissible in evidence, the questions and answers to them could not be said to be 'duly recorded', as the questions were not such as were allowed by the law to be put, and the answer to these questions were not admissible in evidence against the accused—4 L. B. R. 244.

'Committing Magistrate'—The phrase 'committing Magistrate' in Secs 287 and 288 is merely a compendious way of referring to the Magistrate or Magistrates who held the preliminary inquiry on which the committal was made. Where a subordinate Magistrate inquired into

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Evidence of approver:—If an accomplice, to whom a conditional pardon has been tendered, is examined as a witness in the trial, his deposition made before the committing Magistrate may be used as evidence—1894 P R 14, 21 All 175, 15 Mad 352 It may be used as evidence against the accused even if it is retracted at the Sessions trial—21 All 175 But in 7 C L R 66, 13 C L R 326 and 11 A W N 184, it has been held that an approver's statement made before the Magistrate but subsequently retracted is no evidence against the accused In 8 S L R 203 it is held that the reliability of such statement is so doubt injuriously affected by the fact of its being retracted before the Sessions Court but it does not follow that it is not entitled to any weight or credibility

'Duly taken in the presence of accused' —A statement made in the absence of the accused could not be treated as evidence against him under this section—1904 P R 3, 23 Cal 361 So also, where the accused was merely allowed to be present but was not allowed to cross examine the witnesses before the committing Magistrate, the evidence of such witness cannot be said to be duly taken, and cannot be treated as evidence under this section—21 Cal 642 Such *ex parte* statements by witness without the accused being allowed to rebut them by cross examination is not evidence at all under this section—*Ibid*

'Discretion of the Judge' —The purpose of this section is to make depositions given before the committing Magistrate evidence at the trial, only when the Sessions Judge in his discretion determines that they are to be used in that way This exercise of discretion is open to review by the Court of Appeal—11 B H C R 281

'Produced and examined' —The evidence of witnesses given before the committing Magistrate may be used as evidence if the witnesses have been *produced* and *examined* at the trial, a statement made before the committing Magistrate by a person who has since disappeared is inadmissible in evidence, because the witness is not produced and examined before the Sessions Judge—16 N L R 30 Mere producing of the witnesses is not sufficient, they must be *examined*—1915 M W N 544, & examined by the prosecution and not merely tendered for cross examination by the accused, without being examined in chief—9 Mad 83 Moreover, the deposition before the committing Magistrate may be treated as evidence *after* the witnesses are examined at the trial—24 W R 11, 1883 P R 54 This section does not allow the use of the deposition as a substitute for examination at the trial This section is not an exception to sec 286, it does not dispense with the

a case and discharged the accused and the District Magistrate acting under sec 436 (now 437) committed the accused for trial, the examination recorded by the subordinate Magistrate will be the examination recorded by the committing Magistrate within the meaning of this section—31 Mad 40

'*Shall be tendered*'—The examination of the accused before the committing Magistrate *must* be given in evidence at the trial. It is not optional with the prosecution to put in such statement or not. If it is not tendered by the prosecution, the Judge is bound to call for it—15 Mad 352, 13 W R 63

"*Read as evidence*"—This section requires that the statements made by the accused before the committing Magistrate must be read out to the prisoners at the trial, but it is not necessary for the Judge to ask them specifically if they have any objection to the reception of these confessions—14 W. R. 9

288 The evidence of a witness duly recorded in the presence of the accused *under Chapter XVIII* may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case *for all purposes subject to the provisions of the Indian Evidence Act, 1872*

Evidence given at preliminary inquiry admissible.

Change—The word 'recorded' has been substituted for the word 'taken', the words "under Chapter XVIII" have been substituted for the words "before the committing Magistrate", and the italicised words at the end of the section have been newly added, by the Cr P C Amendment Act, 1923. 'The words 'under Chapter XVIII' have been used in place of 'the committing Magistrate' to cover the case of evidence recorded by a Magistrate, other than the committing Magistrate, under sec 219'—*Report of the Select Committee of 1916*

Object and scope of section—This section is intended to provide for the contingency that may arise when a witness who is produced before the Court of Session holds back information and evidence, and tells a different story from that which he gave before the Magistrate in the preliminary inquiry—2 All 646

The section refers only to the evidence of witnesses recorded under Chap XVIII. Statements made by witnesses before a Police officer or to an investigating Magistrate are not contemplated by this section—31 Mad 127. A statement made by a witness at a search does not come under this section—36 Mad 159

n cannot be based upon statements of witnesses before committing Magistrate, which gave only circumstantial evidence sufficient to connect the accused with the commission of the crime—
15 P W R 15

Retracted Depositions—A statement made by a witness before a committing Magistrate and subsequently repudiated by him before the Sessions Court, is admissible in the Court merely for the purpose of contradicting the witness. But the substance of such repudiated statement should not be used by the prosecution as substantial evidence of the allegations—22 All 445 unless it is corroborated on some material particulars by independent evidence—21 W R 49, 27 Cal 295, 10 C W N cccxiii, 21 All 111 Ratanlal 966, 2 Weir 374, 375. A conviction based solely on evidence given by the witnesses before the committing Magistrate and retracted by them at the trial is unsustainable—1919 P R 17

Where a witness, who in the sessions trial resiled from his deposition given before the Magistrate, states that the latter deposition was made under the influence of the Police the Judge would exercise a proper discretion in making some inquiry by examining the Inspector of Police, regarding the restraint and pressure put upon the witness, before admitting such statement as evidence—4 C W N 49

Subject to the provisions of the Evidence Act—Under the old section it was held that the statements of witnesses made before the committing Magistrate could be used as evidence in the case irrespective of the provisions of the Evidence Act. Thus, where two witnesses made certain statements implicating the accused, during the course of an investigation and told the same story before the committing Magistrate, but at the trial before the Sessions Judge they resiled from their previous statements and told an altogether different story, whereupon the Judge used the previous statements only to negative the statements made at the trial, *held* that though section 155 of the Evidence Act rendered the previous statements relevant only to contradict or negative the statements made before the Court of Session, yet *section 283 of the Cr P Code went further* and made the statements made before the committing Magistrate 'evidence in the case' i.e., substantive evidence of all the facts therein deposed to—46 Bom 97, 24 Mad 414. These cases are no longer good law, for under the present section as amended, the statements made before the committing Magistrate can be used only subject to the provisions of the Evidence Act.

examination of witnesses directed by sec 286—9 Mad 83, 1 W R 14 The Sessions Judge is not justified in convicting the prisoner solely upon the evidence of the witnesses given before the committing Magistrate without examining them afresh—24 W. R 11 Without examining the witness it is improper to read the deposition of the witness given before the Magistrate and to ask him if it is true Such a procedure amounts to putting a leading question to the witness, and it is an implied intimation that the same story is expected from him again—6 C P L R 33 This section has no operation whatever unless the witness at the trial makes statements *inconsistent* with his deposition before the Magistrate—24 W R 11.

Further, the statements made by a witness before the committing Magistrate should not be read out to the witness, in the trial, before the defence has had an opportunity of cross examining him—3 Lah 144

Moreover, the deposition of the witness before the committing Magistrate can be used as evidence if the witness is examined at the trial *as a witness* Where the witness before the committing Magistrate being found concerned in the offence was committed to take his trial along with the accused in the case, his deposition in the Magistrate's Court cannot be treated as evidence against the accused under this section, he not being a *witness* in the trial—1883 P R 23

Use at the trial of the deposition before the Magistrate — Where a deposition of a witness given before the committing Magistrate is tendered in evidence at the Sessions trial, the Sessions Judge should then and there determine the question of its admissibility and record his reasons for its admission as evidence—1 Bom L R 156

Depositions of witnesses taken before the committing Magistrate may, in the discretion of the Judge be admitted in evidence at the trial in the Sessions Court, and when so admitted they are on the same footing as the other evidence on the record—28 All 683 A Court of Session may admit in evidence the statements made by witnesses before the committing Magistrate when such evidence is to a certain extent corroborated by independent testimony before itself If there is no such corroborative evidence, it is not proper to base a conviction solely upon the deposition made before the Magistrate—21 All 111, 1917 P R 37 Where a witness was not examined in the Sessions Court with regard to the particular statements made by him before the committing Magistrate and he did not repeat those statements before the Sessions Court it was held that the Sessions Judge could not properly admit such statements in evidence under this section, as they were not corroborated—4 C W N 49

then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict of not guilty.

(3) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is no evidence that the accused committed the offence, the Court may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict of not guilty.

(4) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is evidence that he committed the offence, or if, on his saying that he does not mean to adduce evidence, the prosecutor sums up his case and the Court considers that there is evidence that the accused committed the offence, the Court shall call on the accused to enter on his defence.

Examination of the accused —The words "if any" show that it is optional with the Judge to examine the accused. The omission to examine the accused is a mere irregularity which does not vitiate the trial—27 Mad. 238, 9 C L J. 55.

Examination of defence witnesses —The accused shall be called upon to adduce evidence after the prosecution witnesses are examined, for it is only when sufficient evidence has been produced that he can be called on to enter upon his defence. It is extremely irregular to examine the defence witnesses before the close of the prosecution evidence, but the conviction will not be set aside if this irregularity has not prejudiced the accused—4 C. L. R. 338.

Sum up —The prosecution has a right to sum up under subsection (2) when all the accused say that they do not mean to adduce evidence — 18 Bom 364

No evidence —Subsection (2) or (3) applies only where there is no evidence, and would not cover cases where the Court considers that the charge is itself improper—12 All 551

When there is no evidence, the jury should be *directed* to find a verdict of not guilty; and it is wrong to leave to the jury to say whether the accused is guilty or not guilty—7 W. R. 39 When there is no evidence, which can if believed amount to proof, the case should not be

Practice and procedure—The Counsel for the prisoner is not entitled to refer to the deposition, for the purpose of contradicting the witness without having drawn the attention of the witness to the alleged contradiction in his deposition, and without having given him the opportunity of explaining it—31 Cal 142 Before a Judge can use as evidence the deposition given before the Magistrate, he is bound to let his intention, or the possibility that he may do so, be known to the accused and the prosecution, in order to afford the accused and the prosecutor an opportunity for testing such statement by cross-examination or otherwise dealing with such statement as part of the case which may be taken into consideration by the Judge—6 A W N 256

It is improper for the Judge trying a case to take a witness's deposition bodily from the committing Magistrate's record, and to treat it as evidence before the Court itself—7 All. 862, 21 All 111 The Judge is bound to put to the witnesses whom he proposes to contradict by their previous statements the whole or such portion of their depositions as he intends to rely upon, so as to afford them an opportunity of explaining their meaning or denying that they had made any such statements and so forth—7 All 862

When a Counsel or pleader cross examines a witness with reference to a previous deposition, the parts thereof to which the cross examination is directed should be set out in the Judge's minute of the proceedings. the depositions must also be numbered and translated in the minute of the proceedings—Ratanlal 343

Power of High Court—Where, in an appeal, the High Court was of opinion that the statements made before the committing Magistrate by certain witnesses who were also examined before the Sessions Judge, should have been brought upon the record by the exercise of the powers conferred by section 288, it directed the Sessions Judge to take proceedings for the purpose, after giving notice to the accused persons that it was proposed to use those statements against them—19 A L J 947.

289. (1) When the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence.

Procedure after examination of witnesses for prosecution.

(2) If he says that he does not, the prosecutor may sum up his case; and, if the Court considers that there is no evidence that the accused committed the offence, it may

16 A L J. 41, however, the omission to call upon the accused to enter on his evidence was held to be a mere irregularity covered by Sec 537, unless the accused was prejudiced thereby.

If the accused has not his witnesses present, the Judge may postpone the case—23 W R 59.

290 The accused or his pleader may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any) and after their cross-examination and re-examination (if any) may sum up his case.

What the accused has not to prove —The burden lies on the prosecution to prove beyond all reasonable doubt that the offence was committed by the accused. If the prosecution cannot prove the guilt of the accused beyond all doubt, the accused is under no obligation to explain how the offence was committed or who committed the offence or by what means—Ritalal 686. When there is no *prima facie* evidence sufficient to convict the accused, he is not under any obligation to explain the Court his movements at the time of the offence—10 Cal. 970.

Nature of defence to be recorded —The record is not complete unless it shows the nature of the defence set up. If the accused makes any statement, it must be recorded. If he makes no statement or refuses to answer when called upon to enter upon his defence, a note should be made accordingly, and when there is nothing to show the nature of the defence, a note of the address to the Court (if any) should be recorded—15 W R 16.

Examination of witnesses —Right of accused —The accused is at liberty to meet the case in any way he likes. He can, as to the whole or any part of the case against him, rely on the witnesses for the prosecution, or may call fresh evidence for himself. No adverse inference will be drawn against him, if he does not produce or examine any witnesses—8 Cal 121, 10 Cal 140. But where a *prima facie* case of circumstances making out or tending to support the charge against the accused is established, and he withholds evidence in disproof or explanation available to him and not accessible to the prosecution, an inference unfavourable to the accused may legitimately be drawn—21 C W N. 1152.

put to the jury at all, as a verdict of guilty cannot under such circumstances be sustained—16 W R 19

Meaning of 'no evidence'—The words 'no evidence' do not mean "no satisfactory, trustworthy or conclusive evidence" If the Court is satisfied that there is not upon the record any evidence which, even if it were perfectly true, would amount to legal proof of the offence charged against the accused, then the Court has power without consulting the assessors, to record a finding of not guilty but the Sessions Judge has no such power merely because he considers the evidence *untrustworthy*, or *unsatisfactory* or *inconclusive* It is not the intention of the Legislature that the assessors or the jury should give their opinion or verdict in those cases only where the Judge is inclined to *believe* the evidence for the prosecution—10 All 414, 16 Bom 414 If there is any evidence *relevant* to the charge prepared, the accused must be called upon to enter upon his defence, and the trial should be completely gone through even though the Sessions Judge may consider such evidence unworthy of belief—2 Weir 382, 9 C P L R 24 The case can be withdrawn from the jury only on the ground that there is *no evidence at all*, and not on the ground that the Judge *disbelieved* the evidence for the prosecution on the strength of the medical evidence—16 W R 20

The accused must be acquitted under this section if there is no evidence on the *prosecution side*, he cannot be convicted on the evidence given against him by the witness called by the *co accused* in his defence—5 M L T 75

Finding of 'not proven'—The Code does not provide for a finding of "not proven" The proper course is to record a finding of "not guilty"—2 Weir 381

Record of verdict—When a judgment of acquittal is recorded under this section, the opinion of the assessors need not be recorded—7 B H C R 82

Defence—A criminal case ought not to be adjudged on mere probabilities The burden of proof is always on the Crown and not to any extent on the accused, and unless the evidence is of such a nature as to enable the Court to judge rather than conjecture, the accused should not be called upon to make his defence—Ratanlal 772, Ratanlal 779

It is not a mere formality, but an essential part of the criminal trial, to call upon the accused to enter on his defence, and omission to do so is not a mere irregularity curable by Sec 537—23 Cal 252 In

293 (1) Whenever the Court thinks that the jury or

View by jury or assess-
sore assessors should view the place in which the offence charged is alleged to have been committed, or any other place in which any other transaction material to the trial is alleged to have occurred the Court shall make an order to that effect, and the jury or assessors shall be conducted in a body, under the care of an officer of the Court, to such place which shall be shown to them by a person appointed by the Court

(2) Such officer shall not, except with the permission of the Court suffer any other person to speak to, or hold any communication with, any of the jury or assessors and unless the Court otherwise directs, they shall, when the view is finished, be immediately conducted back into Court

This section speaks of view of the *locus in quo* by jurors and assessors, whereas section 529B relates to view of the place by Judges and Magistrates

Examination of witnesses not permitted —The assessors can only *view* the scene of the alleged offence and cannot *examine* any witnesses on the spot because by subsection (2) the officer conducting the jurors or assessors to the spot cannot suffer any other person to speak to them—5 W R 59

294 If a juror or assessor is personally acquainted with

When juror or assess-
sor may be examined any relevant fact, it is his duty to inform the Judge that such is the case, whereupon he may be sworn examined cross examined and re-examined in the same manner as any other witness

295 If a trial is adjourned, the jury or assessors

Jury or assessors to
attend at adjourned
sitting shall attend at the adjourned sitting, and at every subsequent sitting until the conclusion of the trial

When trial should be adjourned —A Judge is bound to adjourn a case in which a witness summoned for the defence is absent, especially if he is a material witness and the case cannot be satisfactorily decided in his absence—15 W R 34, 18 W R 20, 23 W R. 58 But under such circumstances the Judge will not be justified in discharging the jury in the midst of a trial and adjourn the case to the next Sessions—4 Bom L. R 939

Under the Code of 1882, the prosecutor had a right of reply, if the accused "stated that he meant to adduce evidence," whether he did or did not actually adduce evidence

What amounts to adducing evidence—The putting in of the depositions of certain prosecution witnesses made before the committing Magistrate and of the statements of the accused made under sec 162 to a Police constable, forming part of the record sent up by the Magistrate, cannot be said to be adducing evidence by the accused within the meaning of this section. The tender of them as evidence by the accused is merely an application to the Judge for the exercise of discretion vested in him by sec 288—31 Cal 1050

The prosecution shall be entitled to reply if the documentary evidence for the defence is adduced *after* the case for the prosecution is closed—43 Cal 426. Therefore, where during the cross examination of the prosecution witnesses and before entering upon defence, the accused put in some documentary evidence, it does not give a right of reply to the Crown, because so long as the case is in the hands of the prosecution the putting in of documents cannot be said to take the prosecution by surprise and this is the correct test for determining whether the prosecution should have the right of reply—to C W N cclxvii, 14 Cal 245, 17 Cal 930, 43 Cal 426, 10 Cal 1024 [*Contra*—14 All 212, 11 Mad 339, 16 All 88, 30 Bom 421, 4 L B R 5 and 1 S L R 91, where it has been held that the prosecutor is entitled to a right of reply even if any documentary evidence is put in by the defence *before* the close of the evidence for the prosecution (e.g. if any document is produced by the defence during the cross examination of prosecution witnesses). This view is no longer correct, by reason of the present amendment of this section.]

If while the case for the prosecution is going on, the defence in his cross examination utilizes a witness for the prosecution to his own advantage or puts in a lot of documentary matter through such witness, it cannot deprive him of his right to the last word because it does not amount to adducing evidence for the defence—11 BOM L R 177

Reply—Reply means reply generally to the whole case. Even if one of the accused calls witnesses and the others do not, the prosecution is entitled to reply not merely on the evidence adduced by one of the accused, but generally on the whole case. It is not the intention of this section that the prosecution is to sum up as to such of the accused as do not call evidence, and reply only on the evidence adduced by the others—18 Bom 364

to enable the Appellate Court to see that all points of law were clearly explained to the jury—34 Cal 698; 26 C. W. N. 996; 2 Weir 385. The Judge should also record in his charge what evidence he reads to the jury—Ratanlal 917. It is not sufficient for the Judge to state in his record of the heads of charges that he referred to certain sections of the Penal Code and explained to the jury the law with regard to the offence, he should set out in the record the directions which he gave to them in respect of the law in order that the High Court may not have to speculate as to what the Judge said but may be in a position to Judge whether the elements constituting the particular offence in question have been properly and fairly explained to the jury—21 Cr. L. J. 694 (Cal). See notes under sec 367.

Summing up—Under this section, the Judge is bound to sum up the evidence for the defence as well as for the prosecution, this being essential for a proper charge—Ratanlal 720 Ratanlal 288. Where the provisions of the section are neglected and the Judge does not sum up at all, the conviction will be set aside and a new trial ordered—9 W. R. 51, 23 Cal 252. The summing up contemplated by this section cannot mean any statement of the evidence which a Judge may in his caprice, think proper to make to the jury, but a proper summing up containing a full and distinct statement of the evidence on both sides, with such advice as to the legal bearing of the evidence and the weight which properly attaches to the several parts of it as a sound judicial discretion would suggest. If the Judge does not sum up in that manner, an error in a matter of law has been committed, and the conviction based on such summing up shall be reversed if the accused shall have been prejudiced by the defect—5 B. H. C. R. 85.

In addressing the jury the Judge should endeavour to speak in a manner simple and direct. The charge must not be involved, nor should the language be extravagant—11 Cr. L. J. 538 (Cal).

He should not use expressions assuming the guilt of the accused, nor should he use slang and colloquial phrases and the interrogative method in charging the jury—45 Cal 557.

In charging the jury it is the duty of the Judge to give a narrative and history of the case to the jury and to place the evidence and facts in a clear manner before them so as to enable them to grasp the details and come to a right decision—6 B. H. C. R. 31. Where the Judge gave no aid to the jury in the arrangement of the facts which were spoken to by witnesses, there was no summing up at all, and the verdict founded thereon was set aside—10 W. R. 7.

Summing up of evidence—It is the duty of the Judge to state to the jury what are the principal points in the evidence and how they bear for

296 The High Court may, from time to time, make rules as to keeping the jury together during a trial before such Court lasting for more than one day, and subject to such rules the presiding Judge may order whether and in what manner the jurors shall be kept together under the charge of an officer of the Court, or whether they shall be allowed to return to their respective homes.

Locking up jury.

F.—Conclusion of Trial in Cases tried by Jury.

297. In cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided.

Charge to jury.

When the case ... are concluded —This section specially enacts that the Judge shall only charge the jury when the case for the defence and the prosecutor's reply are concluded, *i. e.* after *all* the evidence has been taken on both sides, and counsel of both parties have finished addressing the jury. A Judge who charges the jury and takes verdict as regards some only of the accused and afterwards hears arguments and takes verdict as against the remaining accused will be acting irregularly and contrary to the provisions of this section—36 Mad. 585.

The procedure adopted by the Judge in requiring the jury to give a finding on one of two questions of fact constituting the proof in the case, before he concluded his charge with reference to the other question of fact, was irregular, if not illegal, and was certainly calculated to embarrass the jury in arriving at a proper verdict as to the character of the offence, if any proved—2 Weir 499.

Charge to jury—Record —It is not necessary that a statement of the Judge's charge to the jury should be reduced to writing before delivery, but it should represent with absolute accuracy the substance of the charge so as to enable the High Court in the event of an appeal to see distinctly whether the case was fairly and properly placed before the jury—23 W. R. (Rules etc.) 7. Although under sec. 367, only the heads of charge to the jury are required to be recorded, still as the law allows an appeal on grounds of misdirection it is not only desirable but necessary that the charge should be recorded with sufficient fulness

Laying down the law — it is duty of the Judge to give a direction
as to the law to the jury so far as to make them understand the law as
they apply it to the facts and to instruct them as to the principles of the law —

Cal 15. "The whole must all be made plain and intelligible to the jury. It is the duty of the judge to explain the law suggested by the evidence, it is the duty of the judge to explain the distinction between murder and capital murder, and the judge must endeavor to have the jury understand the difference between a murder and a capital murder. In a charge of this kind the jury must be told that the law is not only taking a case when there is an intent to kill but also taking a case when there is a killing of the commonwealth's interest in the life of a person, a case which is a murder in what sense and in what way. The law is a duty in law—Cal 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 82

The Judge cannot omit to explain the law on the ground that it has been sufficiently explained by the readers on both sides in the addresses to the jury. The responsibility of laying down the law for the guidance of the jury rests entirely with the Judge, and the verdict given by the jury in the absence of any such direction on the law by which they should be guided cannot be accepted as a valid verdict in the case—29 Cal. 379

But in explaining the law upon a particular offence the Judge ought not to discourse in all branches and departments of the crime, especially in a case of complicated offence as murder or culpable homicide. To do so is to confuse the jury and possibly to direct their deliberations into channels that have nothing to do with the case—19 C W N 653. The Judge should lay down the law only in so far as it has a bearing on the evidence adduced in the particular case, to simplify the issue fairly and properly before the Court to keep the jury within proper limits and not to perplex their minds with considerations that are outside the legitimate scope of the inquiry—19 C W N 653. All unnecessary discussions and arguments should be avoided by the Judge, and the summing up should be strictly confined to the evidence adduced and the mode of application of the law to such evidence—8 W R 87.

for against the prisoner, in short to render the jury every assistance in his power towards coming to a right conclusion—6 W R 72 He should state the evidence *pro* and *con* with a running commentary as to its agreement and disagreement with the other facts of the case—1 W R 25, 2, W R 54 Where a fair and proper statement of the evidence has not been placed before the jury, the High Court will set aside the conviction—13 C W N 754 Where the Judge did not sum up the evidence at all but simply charged the jury with these words— 'It is for you to say from the evidence you have heard whether you consider the accused guilty or not,' it was held that the charge was wholly insufficient, and a retrial was ordered in the case—22 A W N 201 Where the Judge did not sum up the evidence to the jury, but only treated it generally and called it very poor evidence which standing alone amounted to nothing, it was held that the charge to the jury was defective—23 Bom 316

In summing up the case, the Judge must place before the jury all facts of prime importance in favour of the accused—6 Bom L R 31 He cannot omit any matters of prime importance, especially if they favour the accused, merely because they have been elaborately discussed by the Advocate—27 Bom 644, 3 S L R 102, 40 Bom 210 So also, he cannot omit to draw the attention of the jury to what appears to be a possible answer to the charge against the accused, notwithstanding that it has escaped the counsel of the accused—19 C W N 653 This section makes it imperative on a Sessions Judge to place in his summing up to the jury evidence both for the prosecution and defence The fact that the pleaders for the accused thought it unnecessary to place much reliance upon the defences of the accused would not absolve the Sessions Judge from his duty of placing before the jury all the facts in favour of the accused—17 Cr L J 19 (Mad)

The Judge must always be careful that he does not usurp the functions of the advocate, and that the evidence of the case is presented to the jury in a dispassionate and impartial manner as is expected of the presiding officer—25 C W N 682

In cases of very serious offences, and where the evidence is merely circumstantial, the evidence should be read over *in extenso* to the jury (and not merely summed up)—5 B H C R 85 Where the trial has been a prolonged one, the Judge ought to read over to the jury the important testimonies in the trial—17 Cr L J 850 But an omission to read out the material portions of the evidence is not in itself sufficient for the reversal of the verdict of the jury In each case it must be a question whether such omission was such as to mislead the jury, and the Appellate Court will not interfere unless it has prejudiced the accused—5 Bom L R 207

'Laying down the law'—It is duty of the Judge to give a direction upon the law to the jury so far as to make them understand the law as bearing upon the facts, and to enable them to decide the point at issue—8 Cal 739 Thus, where in a trial for murder, grave and sudden provocation causes loss of power of self control is suggested for the defence, it is the duty of the Judge to explain the distinction between murder and culpable homicide, and the jury as judges of facts have to decide the issue as to sudden provocation—Ratanlal 766 In a charge of rioting, the jury must be told that a rioting can only take place when there is an unlawful assembly consisting of at least five men with one of the common objects mentioned in the I P C and it is essentially necessary to mention what an unlawful assembly is The jury are not experts in law—17 Cr L J. 92 (Cal) Mere reference to sections of the I P C defining offences (25 Cal 736) or mere reading out to the jury the sections of the I P C does not amount to a sufficient explanation of the law—4 C W N 193. Nor should the Judge merely leave the Penal Code to the jury to read and interpret it for themselves, but he must explain the law to them and tell them in a kind of popular language of what offence they are to convict the accused—14 Cal 164 Moreover, it is the duty of the Judge to call the attention of the jury to the different elements constituting the offence, and to deal with the evidence by which it is proposed to make the accused liable—25 Cal 711, 21 Cr L J 694 (Cal), 30 Mad 44. It is also the duty of the Judge to explain the law as regards abetment—47 Cal 46

The Judge cannot omit to explain the law on the ground that it has been sufficiently explained by the pleaders on both sides in their addresses to the jury The responsibility of laying down the law for the guidance of the jury rests entirely with the Judge, and the verdict given by the jury in the absence of any such direction on the law by which they should be guided cannot be accepted as a valid verdict in the case—29 Cal 379

But in explaining the law upon a particular offence the Judge ought not to discourse in all branches and departments of the crime, especially in a case of complicated offence as murder or culpable homicide To do so is to confuse the jury and possibly to direct their deliberations into channels that have nothing to do with the case—19 C W N 653 The Judge should lay down the law only in so far as it has a bearing on the evidence adduced in the particular case, to simplify the issue fairly and properly before the Court, to keep the jury within proper limits and not to perplex their minds with considerations that are outside the legitimate scope of the inquiry—19 C W N 653 All unnecessary discussions and arguments should be avoided by the Judge, and the summing up should be strictly confined to the evidence adduced and the mode of application of the law to such evidence—8 W R 87

Misdirection to Jury — Examples —(1) Omission to give the jury a sufficient explanation of the law so as to enable them to decide the point at issue is a misdirection—8 Cal. 739, 25 Cal 561; 2 Weir 500, 25 Cal 736. Thus, where in a dacoity case, the Judge stated to the jury "Dacoity is committed when any number of persons not less than five conjointly commit robbery" but did not explain to the jury what is necessary to constitute the offence of robbery, it is an omission to lay down the law, and amounts to a misdirection—30 Mad 44. So also omission to explain to the jury the difference between murder and culpable homicide, or to tell them under what view of the facts the accused ought to be convicted of murder or culpable homicide or to be acquitted is a misdirection—3 L. B. R. 75. It is a misdirection not to adequately explain to the jury the law in regard to abetment—47 Cal 46.

(2) Failure to call the attention of the different elements constituting the offence is a misdirection—25 Cal 711. Thus, where in a case of murder, the Judge simply asked the jury to find whether the prisoner inflicted the injuries on the deceased, it was held to be a misdirection, the jury ought to have been asked to find as to the *intention* of the accused to cause death or the *knowledge* that he was likely to cause death—1 Bom. L. R. 784, 35 Cal 531. Similarly, where in a case under secs 474 and 475 I. P. C., the Judge told the jury that the only issue which they had to decide was whether the forged documents were in the possession of the accused, ignoring altogether the question of knowledge combined with intention which is so absolutely requisite to justify a conviction under sec 474 it was held that the Judge had misdirected the jury—16 Bom. 165. Where in a case of retaining stolen property, the Judge directed the jury to decide whether the property was stolen and whether it was retained by the accused, without asking them to decide whether the accused *knew* or had reason to believe the property to be stolen, it was held that this amounted to a misdirection—15 Bom 369.

(3) Failure to point out to the jury as to the relevancy or otherwise of a confession made under inducement, and merely telling the jury that if the confession was true it was enough to warrant the conviction of the accused, is a misdirection—26 Mad 38. See notes under sec 298.

(4) Omission to explain to the jury the attitude to be taken towards a retracted confession as evidence against a co accused is a misdirection—47 Cal 46. It is a misdirection to tell the jury that the retracted confessions are not to be held true unless they are corroborated by independent reliable evidence, because there is no rule of law that a retracted confession must be supported by independent reliable evidence corroborating it in material particulars—23 Bom 316. (*Contr*—1st

All 78, 2 Weir 507 and 2 Weir 509, where it has been held that if a confession is subsequently retracted and it is not corroborated by independent evidence, the Judge should point out to the jury that it is not safe to rely on the retracted confession unless it is corroborated by independent reliable evidence, and an omission to point this out to the jury amounts to a misdirection) It is also a misdirection to the jury to tell them to leave out of consideration the retracted confessions of the accused—8 M L T 372 The question to be put to the jury regarding such confessions is not whether they are corroborated by independent evidence but whether having regard to the circumstances under which they were made and retracted and all the circumstances connected with them, it was more probable that the original confessions or the statements retracting them were true An omission on the part of the Judge to put this question to the jury amounts to a misdirection—21 Mad 83

(5) A Sessions Judge should caution the jury not to accept the accomplice's evidence unless it is corroborated in material particulars Omission to state this amounts to a misdirection—24 C W N 119 12 Mad 196

(6) An omission to arrange the facts deposed to by witnesses—10 W R 7, or omission to point out to the jury that there was an absence of evidence material to the case for the prosecution is a misdirection—23 W R 21

(7) The Judge should not give his opinion to the jury upon a question of fact or an inference deducible from the facts If he does so, it amounts to a misdirection—4 C W N 193 4 C W N 196, 34 Cal 698, see notes under sec. 298

(8) When a charge to the jury placed prominently before them all the circumstances that went against the accused, and did not call their attention to any of those that were in favour of the accused it was held that there was a misdirection sufficient to vitiate the trial—4 C W N 196 40 Bom 220, 21 Cr L J 670 (Cal) But the fact that every point in favour of the accused has not been put to the jury does not amount to misdirection The charge must be judged as a whole and one must see whether judging it as a whole the case for the two sides has been fairly put so that the jury can understand what they have to decide and can come to a right conclusion It is not necessary for the Sessions Judge to repeat everything that has been said by the pleader for the defence in his speech But he should draw the attention of the jury to the more essential items and the strongest argument that had been advanced for the defence A mere reference to the argument of the pleader is insufficient—34 C I J 512, 49 Cal 573

(9) A Judge's direction to the jury to consider the proof of previous convictions as evidence giving rise to an inference regarding the character of the prisoner amounts to a misdirection—5 Cal 768 See section 310

(10) Omission to tell the jury that the accused is entitled to the benefit of any reasonable doubt that they may have on any point, is a misdirection—34 Cal 698

(11) Where the Judge stated in his charge to the jury that there was a mass of oral evidence on behalf of the prosecution as well as for the defence, but that the jury might neglect it all, it was held that this was a misdirection, because it is the duty of the jury to give their verdict upon considering the whole of the evidence—6 Bom L R 31

(12) Omission to invite the jury to consider carefully what each of the accused said in his statement with reference to the charges framed against him, is a misdirection—47 Cal 46

(13) Omission to make the jury acquainted with the nature of the case for the prosecution and the nature of the case for the defence is a misdirection—23 C W N 833

(14) In a case of theft the failure on the part of the Judge to call attention to the whole of the evidence telling against the accused and especially his observation as to the case resting wholly on the identification of certain jewels with which the evidence went to show that the accused had dealt, constitutes a misdirection—2 Weir 488

(15) Where in a case of theft, the only evidence against the accused was the possession of stolen property 5 years after the occurrence, it was held that the Judge had misdirected the jury by saying "on this evidence, notwithstanding that it is nearly 5 years since the crime occurred, you will decide whether you are satisfied with the prisoner's explanation for his possession of the stolen property" The proper course would be to tell them to consider whether after 5 years it was reasonable to require the prisoner to prove how he came by the goods or whether his story, not being in itself improbable, ought not to be accepted—2 Weir 489

(16) A direction to the jury that they should convict the prisoner if they believed that he had shown the stolen property to the Police is a misdirection, because the mere fact that a person knew where the stolen property was and showed it to the police is not equivalent to possession of stolen property—2 Weir 493

(17) Where a Judge directed the jury to acquit one of the prisoners on the ground that the witnesses who identified him had deposed falsely, it was held that the Judge ought to have made it clear to the jury that he believed the witnesses on whose testimony the conviction of any other prisoners, that was a circumstance

to be carefully weighed by them in estimating the credibility of the testimony so far as it affected the other accused. His omission to do so amounted to a misdirection—2 Weir 501.

(18) Omission to point out to the jury the discrepancies in the evidence of the principal witnesses for the prosecution constitutes a misdirection—33 C L J 180

(19) It is a misdirection not to explain to the jury the difference between a crime and a civil wrong (e g. the distinction between a civil and a criminal trespass)—41 Cal 662

Non direction —Mere non direction is not necessarily misdirection; those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood—1 P L J 317 In a charge of unlawful assembly, the omission to explain clearly to the jury the alleged common object of the unlawful assembly, is not a misdirection, but a mere non-direction which will not justify the verdict being set aside, if the prisoner was not prejudiced thereby—4 C W N 196, 17 Cr L J. 92 (Cal) Failure to point out to the jury the weakness of the evidence against the accused and the possibility of the offence having been committed by another is not a positive misdirection, but merely a non-direction—5 W R 13 Omission to call the attention of the jury to the evidence of defence witnesses whom the High Court considered to be untrustworthy is a mere non direction and not a mis direction—7 Cal 42 Omission to enter into details concerning the identification of stolen articles is not a misdirection—1 W R 22

298 (1) In such cases it is the

Duty of Judge.

duty of the Judge—

- (a) to decide all questions of law arising in the course of the trial, and especially all questions as to the relevancy of facts which it is proposed to prove, and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties; and, in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties;
- (b) to decide upon the meaning and construction of all documents given in evidence at the trial;

- (c) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given ;
- (d) to decide whether any question which arises is for himself or for the jury, and upon this point his decision shall bind the jurors.

(2) The Judge may, if he thinks proper, in the course of his summing up express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact, relevant to the proceeding.

Illustrations.

(a) It is proposed to prove a statement made by a person not being a witness in the case on the ground that circumstances are proved which render evidence of such statement admissible.

It is for the Judge, and not for the jury, to decide whether the existence of those circumstances has been proved.

(b) It is proposed to give secondary evidence of a document the original of which is alleged to have been lost or destroyed.

It is the duty of the Judge to decide whether the original has been lost or destroyed.

Questions of law.—In a charge under sec 376 I P C. the question whether, when the complainant had consented to the act, the offence within the meaning of sec. 375 I. P C has been committed, is one of law for the Judge to decide under this section and not a question for the jury—19 Bom. 735. The question as to whether a communication is privileged or not is one of law for the Judge to decide, and he should not leave it to the jury to find whether it is so or not—10 W. R. 11

Admissibility of evidence.—It is for the Judge to decide whether the evidence adduced before him is *admissible* or not ; the *credibility* of evidence is to be left to the jury—25 Cal 736 ; 45 Cal 557. Thus the question as to which documents or evidence the jury are to receive is for the Judge to decide, and the question as to what they are to believe is for the jury—Ratanlal 452 It is a misdirection for the Judge to say that he sees no reason to disbelieve a particular witness. He ought to leave the believing or disbelieving to the jury—7 C L J 246

In case of accomplice evidence, the Judge should caution the jury not to accept the approver's evidence unless it is corroborated. Omission to say so will amount to misdirection—12 Mad 196, 24 C W N 119. The failure to tell the jury explicitly that the statement of one prisoner against another should not be considered in weighing the evidence against that other is such a grave irregularity as to vitiate the trial, even though the Judge in summing up considered separately the evidence against each of the accused without referring at all to the statement referred to—6 B H C R 10. See Secs 114 and 133 of the Evidence Act.

Confessions —It is for the Judge to decide whether the statements or confessions made to the Magistrate and how much of the confessions made to the police are admissible, leaving it to the jury to decide amounts to a misdirection—45 Cal 557. Omission to mention to the jury that a confession made by the accused to the police officer is inadmissible in evidence, is a misdirection—3 P L T 401. The Judge must decide whether the confessions are voluntarily made or not. It is not for the jury to decide. But once the confessions are admitted in evidence, it is for the jury to determine the weight to be attached to them and the truth or otherwise of those confessions—11 Bom L R 332. But the Judge should charge the jury that the mere confessions of prisoners tried simultaneously with the accused for the same offence, which are in a very qualified manner made operative as evidence by sec 30 of the Evidence Act, ought to be valued merely as accomplice's testimony, and to be treated as evidence of a peculiarly infirm and defective character requiring specially careful scrutiny before it could be safely relied on—21 W R 47. Where a Judge admitted in evidence a confession made before a Police Officer, and directed the jury that the confession could and should be used not merely against the maker but also against his co-accused, it is a misdirection—45 Cal 557.

As regards retracted confessions, see notes under sec 297 under heading '*Misdirection to Jury*'.

Inadmissible Evidence —It is the duty of the Judge to see that evidence which is not admissible in itself should not be allowed to go in to the prejudice of the accused—25 Cal 736. Where a document which is not *per se* admissible, is admitted by the Court and the accused having sufficient opportunity at the trial omits to take any objection, he cannot afterwards in appeal impeach the verdict of the jury on the ground that the document had been admitted without formal proof. But it is competent to the High Court to consider whether after excluding the evidence wrongly admitted, the rest of the evidence is sufficient to sustain the verdict—19 Cr L J. 886 (Pat.)

Meaning and construction of document—The Judge must explain to the jury the legal construction to be put upon a document and its legal effect and bearing—3 W. R. 69 If there appears to be a palpable blot or alteration on the face of a document, the Judge has every right to draw the attention of the jury to it—17 W. R. 58

Clause (c)—It is the duty of the Judge to decide upon all matters which it may be necessary to prove in order to enable evidence of particular matters to be given Thus, if it is proposed to give secondary evidence of a document the original of which is alleged to have been lost or destroyed, it is the duty of the Judge to decide whether the original has been lost or destroyed—Ratanlal 452 Where the accused made one confession before the committing Magistrate, and another confession before the Court of Session, retracting the previous confession, and alleged that he was beaten by the Police, and the previous confession was caused by inducement offered by the Police, it was held that the Judge ought to decide whether the first confession was induced by illegal promise and whether that inducement still existed or had been effectually dispelled when the Magistrate recorded the confession—Ratanlal 245

Expression of opinion by Judge—Though it is open to a Judge to express his opinion to the jury on any matter of fact, 10 Cal 970, and to let the jury know the impressions which the evidence has made upon his own mind, 13 W. R. 34, still the Judge ought to refrain from expressing any decided opinion on matters of fact in unmistakable terms—1 W. R. 2, 1 W. R. 25 In giving his opinion he should not be so positive as to leave the jury no loop-hole for taking any other view of the facts—Ratanlal 748. He should present the facts in their natural aspect and ought to leave the jury to decide the facts for themselves, and he must not suggest far fetched explanations of points that tell in favour of or against either party—2 Weir 386, 14 M. L. T. 44 If he expresses any opinion, he should also add that it is his own opinion and that the jury is at liberty to draw their own conclusions—2 Weir 385; 10 Cal 970 The Judge should tell the jury that his opinion is not binding on them, and that they are the sole judges of facts—35 Cal 531.

Duty of jury.

299 It is the duty of the jury—

- (a) to decide which view of the facts is true and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned,

- (b) to determine the meaning of all technical terms (other than terms of law) and words used in an unusual sense which it may be necessary to determine, whether such words occur in documents or not,
- (c) to decide all questions which according to law are to be deemed questions of fact,
- (d) to decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning

Illustrations

(a) A is tried for the murder of B

It is the duty of the Judge to explain to the jury the distinction between murder and culpable homicide, and to tell them under what view of the facts A ought to be convicted of murder, or of culpable homicide, or to be acquitted

It is the duty of the jury to decide which view of the facts is true and to return a verdict in accordance with the direction of the Judge, whether that direction is right or wrong, and whether they do or do not agree with it

(b) The question is whether a person entertained a reasonable belief on a particular point—whether work was done with reasonable skill or due diligence

Each of these is a question for the jury

View of facts,—It means the whole view of facts alleged against the accused—the view taken by the prosecution which leads to the conclusion of his guilt, or the view which is set up on his behalf and which would make him innocent—21 W R. 72

In an offence under sec. 193 I P C it is enough for the jury to find that the two contradictory statements are proved to their satisfaction and they need not find which of the two statements is false—21 W. R 72.

Direction of the Judge —What a Judge says to the jury upon a point of law is a binding direction upon the jury—29 W R 41 They are not entitled to resort to a commentary on the law during their consultation about the verdict They should take the law from the Judge—6 Bom L R 258

If the jury return a verdict according to the direction of the Judge, the High Court will not interfere with the verdict, unless it is manifestly erroneous—11 Cal 85

Questions of fact —It is the duty of the jury and not of the Judge to decide all questions of fact Where in the summing up, the Judge left no question of fact for the jury to decide but decided all himself and said expressly that in his opinion it was proved that the accused has committed murder, and the only thing he left to the jury was to say which of the exceptions to sec 300 I P C applied if the jury held that the offence did not amount to murder, it was held that such a summing up was not in accordance with law, and a new trial should be ordered—9 W R 51 But although the jury are the sole judges of facts, still it is the duty of the Judge to help the jury to find facts He has to advise the jury as to the logical bearing of the evidence* admitted upon the matters to be found by them—23 C W N 833

The following are instances of questions of facts —(1) The question of intent in a case of kidnapping—14 All 25, (2) the question as to whether there was free consent, in a case under sec 376 I P C—1 W R 21, (3) the question whether a fact was or was not proved, or what fact was proved—4 C W N 576, (4) the question as to the identity of thumb impressions on two or more documents for the purpose of ascertaining whether the thumb impressions are of one and the same person—1 C L J 385, (5) the question whether the possession of the stolen property was recent enough to warrant a conviction for the substantive offence of larceny—26 Mad 467

Illustration (1) —Although Illustration (1) lays down that in a charge of murder the Judge should explain to the jury the distinction between murder and culpable homicide, still where* in a trial for murder a verdict for culpable homicide not amounting to murder could not be properly come to under any aspect of the case before the Court the Judge is not called upon to explain to the jury the distinction between murder and culpable homicide not amounting to murder—8 L B R 305

300 In cases tried by jury, after the Judge has finished his charge, the jury may retire to consider their verdict.

Retirement to consider.

Except with the leave of the Court, no person other than a juror shall speak to, or hold any communication with, any member of such jury.

This section, which is explicit in its terms, should be strictly observed and it is highly undesirable that a jury in any case should have any communication with any body (even the Judge) who is not a jury man upon the subject matter of the trial—44 Cal 723. Where it was proved that after the charge to the jury had been delivered, a person other than a juror spoke to or held communication with a member of the jury without the leave of the Court, it was held that that was sufficient to upset the verdict and it was not relevant to consider whether the irregularity had in fact prejudiced the accused—46 Cal 207.

But in a Madras case, where during an adjournment of the Court before the Judge's charge was finished, one of the jurors was seen conversing with strangers but it did not appear that the conversation was about the case, it was held that this was not a sufficient ground for interfering with the verdict of the jury—10 L. W. 379.

After the conclusion of the evidence and after the conclusion of the address of the public prosecutor, and before the defence had been heard in full and before the Sessions Judge had summed up the case to the jury, one of the jurors, in a room occupied by the clerks of the pleaders, in answer to some questions put to him, intimated that in his opinion the accused was guilty of the charge against him, and the Sessions Judge, although informed of the fact, proceeded with the trial, and took the verdict of the jury, held that the verdict must be set aside and there should be a fresh trial before a fresh jury—25 C W N. 240.

301. When the jury have considered their verdict, the foreman shall inform the Judge what is their verdict, or what is the verdict of a majority.

Delivery of verdict.

Verdict —It is a dangerous thing for a Court to rely upon anything except the verdict of the jury, or to listen to the deliberations of the jury or to the statements of individual jurymen made to this or that person, after they had performed their duty and delivered their verdict—44 Cal 723.

Form —The law does not prescribe any specific form in which the

verdict is to be returned The jury may return their verdict in any form they think fit—14 W R 59

Verdict for offence not charged —The jury can return a verdict for a lesser offence, ignoring the graver charge, if the evidence before them does not warrant a verdict for the latter—3 W R 41 And the jury may do so, even though the accused was not charged with the lesser offence—26 Mad 243 Thus, the jury can return a verdict for abetment or attempt, though the prisoner was charged with the substantive offence only—16 Cr L J 676 (Bur) 13 O C 295

Alternative charge —Where the charge against the accused was under sec 149 read alternatively with sec 325 I P C (*i e* being members of an unlawful assembly, and causing grievous hurt by implication) a verdict of guilty of the offence under sec 325 I P C, alone, although it did not form the subject of a separate charge, was legally sustainable—5 Cal 871.

Several offences —When a person is charged with several offences arising out of a single act or series of acts, the word 'verdict' means the entire verdict on all the charges and is not confined to a verdict on a particular charge—22 Cal 377

Several accused —Where there are several accused, the jury have to give their verdict on the facts against each man severally, and even when several prisoners are jointly tried, the jury can convict one and acquit the others—16 C W N 909

Individual opinion not to be taken —By 'verdict' should be understood the collective opinion of the jury as a body, arrived at after mutual consultation and ascertained and announced by the foreman In case of disagreement among the jury, the individual opinions of the members are never intended to be disclosed—36 Mad 585

Full verdict to be taken —Where after the delivery of the verdict the jury wanted to say something more, it is undesirable to stop the jury at such a stage of the proceedings, for it may so happen that before the verdict is recorded, the foreman may make some observations in respect of that verdict which may show the Judge that the jury have not properly understood the case It would then be the duty of the Judge not to record the verdict, but to re-charge the jury so as to lay the case properly before them—30 Cal 485

If jury do not understand the case —Where the jury were apparently not able to follow the summing up of the Judge as regards the law bearing on the charges, it is the duty of the Judge, when the foreman told him of it to explain it to them again—1911 M W N 190 There can be no valid verdict if the jury have not rightly understood the nature of the offence in question—21 W R 1

302 If the jury are not unanimous, the Judge may require them to retire for further consideration. After such period as the Judge considers reasonable, the jury may deliver their verdict, although they are not unanimous

Procedure where jury differ.

Application of section —Under this section the Sessions Judge can ask the jury, if they are not unanimous, to retire for further consideration, *before* the delivery of verdict, but cannot do so *after* its actual delivery—7 L. B. R. 140, 36 Mad. 385

But if the verdict is not clear, the Judge may require them, after delivery of verdict to reconsider it even though they be unanimous, since a verdict which is ambiguous or not clear cannot be received—1 W. R. 50

If the jury are not unanimous —A jury may be required to retire for further consideration, only when their verdict is not unanimous. A unanimous verdict of the jury, unless it is contrary to law, must be received by the Judge—5 Cal 871; 7 W. R. 22, 3 L. B. R. 75 If the jury is unanimous, and there is no ambiguity in the verdict, the Judge cannot require them to reconsider their verdict—19 Bom 735, 20 Bom 215 If the Judge disagrees with the verdict the only course open to him is to act under sec. 307—28 Bom 412

'Further consideration' —When the jury are not unanimous it is open to the Judge to require them to retire for further consideration, giving at the same time further directions on matters of law—6 Bom. L. R. 258. But the Judge is not bound to summon a fresh jury—1 W. R. 41.

303. (1) Unless otherwise ordered by the Court, the jury shall return a verdict on all the charges on which the accused is tried and the Judge may ask them such questions as are necessary to ascertain what their verdict is

Verdict to be given on each charge. Judge may question jury.

(2) Such questions and the answers to them shall be recorded.

Questions and answers to be recorded

Verdict on all the charges —The Judge ought to call on the jury to return a verdict on each one of the heads of the charges. If the trial is for murder of two persons, and the jury return a verdict of guilty, the Sessions Judge should ascertain whether the verdict relates to the killing of one or the other or both—Ratanlal 746, 22 Cal 377.

Questioning the Jury —The Judge is entitled to question the jury as to their verdict, only where it is ambiguous or incomplete and it is necessary to ascertain what the verdict really is—36 Mad 585; 32 Cal.

759, 15 Cal 452, 21 Cal 955, 20 Bom 215, 21 W R 1 If the verdict of the jury is incomplete or is not free from ambiguity, the Judge is wrong in accepting such verdict without questioning the jury as to what their verdict really is. Thus, where the jury returned a verdict of 'guilty but not voluntarily' under a charge of *voluntarily* causing grievous hurt and the Judge accepted the verdict to be one of guilty, and convicted the accused, it was held that the verdict was really one of not guilty and the Judge was wrong without further questioning the jury in treating it as a verdict of 'guilty'—12 C W N 530, see also 7 C W N 135. In a case of rioting, if the verdict of the jury leaves it uncertain what the common object of the assembly is, the Judge ought to ask the jury questions under this section to ascertain the common object. If he does not do so, the verdict is bad in law—21 Cal 955. Where the verdict is general and complete and free from ambiguity, the Judge is not competent to put questions to the jury, but must accept it without question—9 Cal 53, Ratanlal 442, 15 Bom 452, 28 Bom 412, 2 A L J 475, 22 M L J 355.

When the jury have delivered a verdict, the Judge cannot ask them to consider their verdict again. The Judge is only entitled to question the jury to ascertain what their verdict really is—36 Mad 585.

Object of questions—This section never contemplates that on ascertaining that the jury are not unanimous, the Judge should make minute inquiries to learn the nature of the majority and its opinion, so that he would have the opportunity of accepting or refusing that opinion as a verdict according as it coincides with his own opinion or not. Whatever may have been the individual opinion of the Judge, if he went so far as to ask the jury what was the exact majority, and what was the opinion of the majority, the Judge ought to receive that verdict without hesitation—10 Cal 140.

Asking reasons for verdict—This section enables the Judge to ask only such questions as are necessary to ascertain what the verdict is—36 Mad 585. Questions put to the jury, demanding their reasons for the verdict (*i e* reasons for convicting or acquitting the accused) specially if the verdict is unanimous exceed the limits of questioning which the law contemplates in this section—6 Bom L R 258, 20 W R 50, 9 Cal 53, 43 Mad 744, 22 M L J 355, 13 Cr L J 586 (Mad). *Contra*—1 C L R. 275 where it has been held that the law does not prevent a Judge from asking the jury questions concerning the grounds on which they have based their verdict, as it may further the ends of justice and enable the Judge to consider whether he can act under sec 307.

But a reference under section 307 does not become invalid by reason of the Sessions Judge's having asked the jury questions as to the reasons

of their verdict—43 Mad 744 On the other hand he should ask reasons under certain circumstances. See 1 P. L. T. 657 cited under section 307.

Questions and answers to be recorded—The questions put to and the answers given by the jury must be recorded in their exact words; it is not enough if their substance only is recorded—8 Cal. 739

304. When by accident or mistake a wrong verdict is delivered, the jury may, before or immediately after it is recorded, amend the verdict, and it shall stand as ultimately amended.

Amending verdict.

"By accident or mistake"—This section contemplates cases where the verdict delivered is not in accordance with what was intended to be delivered by the jury, such mistake being the result of an accident only. But where the jury commits a mistake in understanding the law, and such mistake results in an erroneous verdict, it cannot be amended by the jury under this section but can be corrected only by the Judge disagreeing with the jury and referring the case under sec 307 to the High Court—28 Bom 412 So also, where the jurors being misled by the notes of the foreman as to some of the evidence, delivered an erroneous verdict, such a verdict could not be said to have been delivered by accident or mistake, and could not be amended by the jury under this section—22 M L J 355.

Where the verdict of the jury is clear and there is no accident or mistake in delivering it, it is a proper verdict and cannot be amended under this section, and a second verdict delivered by the jury after being questioned by the Judge, cannot be allowed to stand as an amendment—Ratanlal 982; 19 Bom 735

"Before or immediately after it is recorded"—The powers of amendment of a verdict provided by this section must be exercised before or immediately after it is recorded, and cannot be exercised after the jurors have dispersed In a trial by jury the foreman announced the verdict of 'not guilty' as the unanimous verdict of the jury, and the verdict was recorded and the prisoner acquitted From information received some days afterwards the Judge was led to believe that the jurors were not agreed as regards the verdict, the Judge summoned the foreman and examined him on oath, he deposed that the verdict given as the unanimous verdict was really the verdict of a majority and was given as the unanimous verdict owing to a misunderstanding that the opinion of the majority was binding upon all jurors. It was held that the Court had no jurisdiction, in consequence of the foreman's subsequent statement, to set aside the verdict and the order of acquittal—1913 P. R 6.

305. (1) When in a case tried before a High Court the jury are unanimous in their opinion, or when as many as six are of one opinion and the Judge agrees with them, the Judge shall give judgment in accordance with such opinion.

(2) When in any such case, the jury are satisfied that they will not be unanimous, but six of them are of one opinion, the foreman shall so inform the Judge.

(3) If the Judge disagrees with the majority, he shall at once discharge the jury.

(4) If there are not so many as six who agree in opinion, the Judge shall after the lapse of such time as he thinks reasonable, discharge the jury.

Under subsection (3), if the jury are divided in the proportion of six to three, the Judge should ascertain the verdict of the majority before discharging the jury. Where six of the jury agreed to a verdict, and the presiding Judge without ascertaining what their verdict was, discharged the jury and ordered a retrial, and the retrial came before another Judge and another jury; it was held that the previous Judge having improperly discharged the jury without ascertaining what their verdict was and whether he agreed or disagreed with the verdict of the majority, the previous Judge has the legal seisin of the case and no other Judge can try it—8 C. W. N. xlviii

306 (1) When in a case tried before the Court of Session the Judge does not think it necessary to express disagreement with the verdict of the jurors or of a majority of the jurors, he shall give judgment accordingly.

(2) If the accused is acquitted, the Judge shall record judgment of acquittal. If the accused is convicted, the Judge shall, *unless he proceeds in accordance with the provisions of Section 562*, pass sentence on him according to law.

The italicised words have added by the Cr. P. C Amendment Act, 1923. The amendment is merely verbal, and is the same as that made in sections 245 (2) and 258 (2)

When the verdict of the jury has been delivered, the Sessions Judge is bound to say and record whether he agreed with the verdict or not

—7 W R 6, 15 W R 46 It is not competent to a Sessions Judge after the jury has returned their verdict and gone away, and in the absence of the accused, to examine some witnesses and then to act on the evidence in determining whether or not he should differ from the jury—7 Bom L R 979 If he agrees with and accepts the verdict of the jury (or of the majority) he is bound to deliver judgment according to the verdict, once he agrees with the verdict, he cannot afterwards reconsider it or disagree with it and refer the matter to the High Court—4 C W N 683

Acquittal —As soon as the judgment of acquittal is pronounced the prisoner is entitled to be discharged from custody (if there is no other charge pending against him) and his further detention is illegal. It is for the jail authorities, in whose custody the prisoner was to satisfy themselves of the result of the trial, and no formal warrant of release by the Court to the jail authorities is necessary—5 M H C R App 2

Sentence —If the verdict of the jury is one of guilty, it is the duty of the Judge to pass an adequate sentence for the offence for which the jury have convicted the prisoner, and the fact that the Judge has differed from the jury cannot be a ground for passing light sentence. In so doing he usurps the functions of the jury—3 W R (Cr Let) 16 He can, if he likes, release the accused on taking bond under section 562

307 (1) If in any such case the Judge disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which *any accused person* has been

Procedure where Sessions Judge disagrees with verdict

tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case *in respect of such accused person* to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and, when the verdict is one of acquittal, stating the offence which he considers to have been committed, *and in such case, if the accused is further charged under the provisions of Section 310, shall proceed to try him on such charge, as if such verdict has been one of conviction*

(2) Whenever the Judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which *such* accused has been tried, but he may either remand *such* accused to custody or admit him to bail

(3) In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict *such* accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and, if it convicts him, may pass such sentence as might have been passed by the Court of Session.

Change .—The main changes are the following *first* in subsection (1) the words "any accused person" have been substituted for the words "the accused", and the words "in respect of such accused person" have been added, in subsections (2) and (3) the words "such accused" have been substituted for the words "the accused" The reasons are thus stated "This amendment prescribes that when a Judge accepts the verdict of the jury in respect of some of the accused, but not of others, he need only refer the case of the latter to the High Court" —*Statement of Objects and Reasons* (1914)

Secondly, the italicised words at the end of subsection (1) have also been newly added "We think, however, that a further amendment is required in section 307, to provide for the case of a person who is also charged with a previous conviction under section 310 It seems obvious that if the Judge disagrees with the verdict of the jury on the principal charge, and submits the case to the High Court, it is desirable that the record should be complete. We propose therefore to insert at the end of section 307 (1) a provision for the trial of the further charge under section 310"—*Report of the Select Committee of 1916* Under the old law, it has been held that if a case is referred to the High Court under sec. 307, there is no conviction or acquittal in the Court of Session. It is the High Court which can convict or acquit the accused, and it is only after such conviction by the High Court that the accused can be asked under sec. 310 to plead to previous convictions—30 Mad. 134 Under the present amendment, provision is made for trial as to the charge of previous conviction, in the Sessions Court itself

Scope of Section .—*Assessor case tried with jury* .—Where the Sessions Judge tried the accused with jury for an offence triable by jury, and with the jurors as assessors for an offence triable with assessors, and differing from them in their verdict and opinion, referred both matters to the High Court, it was held that as to the matter triable

with assessors, the Judge should not have included it in the reference but should have disposed of it according to law—8 Bom L R 599; 9 Bom L R 1057, Ratanlal 630. 36 M L J 452 But if the Judge tries the assessor case with the aid of the jurors as *jurors* and not as *assessors*, and disagrees with their *verdict* (not opinion) he can refer the case to the High Court—23 Bom 696; 25 Cal 555

Who can refer —The reference under this section must be made by the Judge who held the trial and heard the evidence and not by the officer who succeeds him as Judge—2 C L J 48 But see section 559 (1)

Disagreement —The Judge can refer the case to the High Court, if he disagrees with the verdict of the jury If he once *accepts* the verdict, he cannot subsequently reconsider it and disagreeing with the verdict refer the case to the High Court—4 C W N 683

The disagreement may be on questions of law as well as of fact—20 W R 1

Where the jury misunderstands the law as explained by the Judge, and delivers a wrong verdict the Judge should refer the case to the High Court under this section, and not ask the jury to reconsider their verdict—28 Bom 412 Even though the verdict of the jury is not contrary to law, if the Judge disagrees with the unanimous verdict of the jury, the only procedure open to him is to proceed under this section—5 Cal 871 In 41 Cal 621 however, it has been held that it is not in every case of doubt nor in every case in which the Judge entertains a view different from that of the jury, that a reference can be made under this section, but the verdict of the jury must be manifestly wrong before such reference can be made

Where the Judge in his direction to the jury himself expressed the opinion that the prosecution evidence was open to hostile criticism, and the jury regarding the evidence with suspicion delivered a verdict of not guilty, the Judge is not justified in referring the case to the High Court, because there cannot be said to have been a disagreement between the Judge and the jury but rather agreement—7 C W N 135

A reference can be made to the High Court only on the ground of disagreement between the Judge and the jury and *on no other grounds* Where the jury returned a verdict of not guilty, the mere fact that in a similar case upon similar evidence the High Court had convicted some other persons, is no ground for referring the case to the High Court—6 Bom L R 599

'Necessary for the ends of justice' —This section leaves the referring of a case to the High Court entirely to the discretion of the Judge, for it is only where he disagrees with the verdict of the jury so completely that he considers it necessary for the ends of justice to

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evidence he believes to be true and his reasons for arriving at his conclusions so as to enable the High Court to appreciate them and to give due weight to them—3 P L T 413, 6 Bom L R 519 Where the Judge merely said that the verdict was against the weight of evidence and expressed no other opinion in his reference, it was held that he ought to have set out on what portions of the evidence or on what facts the accused should have been convicted—7 C W N 345 So also, where the Sessions Judge merely stated in his reference that the verdict of the jury was erroneous and inconsistent and could not be accepted and that if the evidence had been believed all the accused should have been found guilty, *held* that the reference was not a proper reference as it did not state the grounds of his opinion The reference should be complete and self contained and it ought not to be necessary to refer to the order sheet—25 C W N 682

He should state with some fulness his view of the evidence and the credibility of the more important witnesses, because the High Court has to attach more or less weight to the opinion of the Judge who saw and heard the witnesses—10 Bom L R 173

Recording evidence —The Judge should state in his reference the evidence for the prosecution and for the defence, the facts which in his opinion are proved upon the evidence recorded in the case, and the conclusions to which these facts lead him—6 Bom L R 599

Stating the offence —In case of an acquittal by the jury the Sessions Judge should state in his reference what offence the accused has in his opinion committed, and on what grounds he differs from the jury—10 Bom L R 173, 3 Cal 623, 25 C W N 682

If Judge refuses to refer —Where a jury convicted the accused against the opinion and advice of the Sessions Judge and the latter declined to refer the case to the High Court under this section, it was held on appeal by the accused that the High Court had no power to interfere, however wrong or absurd the verdict might have been in as much as there was no misdirection by the Sessions Judge, and as there was evidence against the accused which was open to the jury to believe—14 Mad 36, 4 M L T 483

Notice to accused —Where the Judge differed from the verdict of the jury and made a reference under this section the High Court before proceeding with the case, gave notice to the accused, as in appeal, to bring forward any objections to the Sessions Judge's recommendations—19 W R 38

'Opinion of the jury' —The opinion of the jury means nothing more than the verdict of the jury, it does not mean the reasons on which the verdict is founded—36 Cal 629, 18 C W N 615, 3 P L T 413,

submit the case to the High Court, that he should do so. This discretion should however always be exercised when the Judge thinks that the verdict is not supported by evidence. It is the only way in which the miscarriage of justice by a perverse verdict of a jury can be remedied by the High Court—13 Mad 343. When the Judge points out to the jury the weak links in the prosecution and they do not consider them, it is not improper for the Judge to refer the case to the High Court, because such a reference is really necessary in the ends of justice—9 C L J 432.

A reference should be made under this section when the Judge is clearly of opinion that such a reference is necessary for the ends of justice—25 Cal 555, that is, when the disagreement between the Judge and the jury is such a complete dissent as to lead the Judge to consider it necessary for the ends of justice to submit the case to the High Court—2 Bom 525, 20 Bom 215. Where a Sessions Judge made a reference on the ground that the question involved was a matter of importance but he did not state that it was necessary for the ends of justice to submit the case to the High Court or that he disagreed with the verdict of the jury, the High Court sent back the case directing the Judge to make a proper reference should he think it necessary to do so—9 C W N 161.

It is no longer the law that before making a reference the Judge must be satisfied that the verdict is *perverse*. It is sufficient that he should be clearly of opinion that a reference is necessary in the ends of justice—23 C W N 747.

Submit the case —*Whether whole case should be referred*—It is not intended that when the Judge is not prepared to accept the verdict of the jury in its entirety, the whole case is to be referred to the High Court. Where the Judge agrees with the jury in respect of a particular accused, the Judge ought to convict or acquit him as the case may be, and it is only with reference to those accused in respect of whom he declines to accept the verdict of the jury that he should make the reference—42 Cal 789. This is now expressly made clear by the present amendment. But where the disagreement between the Judge and jury is as to some of the *charges* it is necessary that the whole case should be referred. When the accused was tried on several charges, and the Sessions Judge accepted the verdict of the jury as to some and disagreed as to the others, and referred the verdict to the High Court as to these latter, it was held that by this limited form of reference the High Court was precluded from considering the entire evidence on record, and that the Sessions Judge should have referred the whole case leaving it to the High Court to consider the whole of the evidence that was placed before the jury—21 C W N 435.

Setting out grounds of his opinion—In referring the case under this section, the Sessions Judge should state what material portions of the

evidence he believes to be true, and his reasons for arriving at his conclusions so as to enable the High Court to appreciate them and to give due weight to them—3 P L T. 413 ; 6 Bom L R 519 Where the Judge merely said that the verdict was against the weight of evidence and expressed no other opinion in his reference, it was held that he ought to have set out on what portions of the evidence or on what facts the accused should have been convicted—7 C W. N 345 So also, where the Sessions Judge merely stated in his reference that the verdict of the jury was erroneous and inconsistent and could not be accepted and that if the evidence had been believed all the accused should have been found guilty, *held* that the reference was not a proper reference, as it did not state the grounds of his opinion The reference should be complete and self contained, and it ought not to be necessary to refer to the order sheet—25 C. W. N 682,

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When High Court will interfere —The High Court will exercise its discretionary powers with great caution and care The mere fact that upon a consideration of all the evidence before the Court, the High Court would have arrived at a conclusion different from that arrived at by the jury, would not justify the High Court in interfering with their unanimous verdict—2 A L J 475 The High Court upon a reference under this section is reluctant to interfere with the unanimous verdict of a jury, and if that verdict is not unreasonable and can upon the evidence be supported, the High Court will accept the verdict even though it may not wholly agree therewith—30 C L J 503 If the High Court is to interfere in every case of doubt, or in every case in which the evidence would have warranted a different verdict, then the real trial by the jury would be at an end, and the verdict of the jury would have no more weight than the opinion of assessors—20 W R 73

The High Court will not exercise its vast discretionary powers vested under this section in setting aside the verdict of a jury, unless it is perversely or patently wrong or may have been induced by an error of the Judge—9 Cal 53, 1 Bom 10, 9 All 420, 2 C L R 518, 10 Bom 497, 15 Bom 452, 20 Bom 215, 20 W R 73, 21 W R 4, 25 W R 25, 11 Cal 85, 22 C W N 811 The High Court will not interfere upon any mere preponderance of evidence, or unless it is satisfied beyond reasonable doubt that the verdict is so distinctly against the evidence that it may be termed a perverse verdict—2 Weir 388, 22 C W N 811, or unless it were established that the jury were wholly misled in their conclusion upon the case—20 W R 33, or unless it be

guilt of the accused is proved beyond reasonable doubt—22 C W. 1028

Power of High Court —In case of a reference under this section the High Court is to give due weight not only to the opinion of the jury but to that of the Judge as well—17 C W N 1077, 6 P L J 264, 3 P L T 413, 41 Cal 754, 29 Cal 128, 15 Cal 269 But although the High Court is bound in dealing with a reference under this section to give due weight to the opinion of the Judge and the jury, still it can decide for itself the question of guilt or otherwise of the accused—11 C W N 715, 15 Bom 452, 36 Cal 629, 9 C L J 432

On a reference under this section, the High Court is competent to consider the entire evidence in the case and to give due weight to the opinions of the Sessions Judge and the jury, and to acquit or convict the accused of any offence of which the jury could have convicted upon the charge framed and placed before it—1 P L T 657 The whole case is open to the High Court when hearing a reference, and in dealing with the reference, the High Court exercises all the powers which it exercises on appeal—47 Bom 31

The High Court cannot consider any question on which the Judge and the jury are agreed, although the verdict of the jury on that point is based upon a misdirection—41 Cal 662, 50 Cal 41

Although the High Court can consider the entire evidence, still it should not ignore the verdict of the jury on a question of fact Unless there is an astounding reason for it, the verdict of the jury on a question of fact will not be set aside The mere fact that another view of the evidence might be taken is not enough—3 P L T 413

Power to convict for offence not charged —Ordinarily the High Court cannot convict the accused for any offence with which he was not charged—41 Cal 662 But the combined effect of this section read with sec. 238 is that the High Court may, in dealing with a case coming before it under this section, convict an accused for a *minor* offence, although he was not charged with such offence—22 Cal 1006 And a Sessions Judge accepting the jury's finding on the graver charges can make a reference to the High Court with the object of having some of the accused convicted on minor charges—37 C L J 34

No appeal from High Court —A High Court in dealing with a reference under this section is not acting in the exercise of its original criminal jurisdiction but only as a Court of reference in a criminal matter—29 Cal 286, and therefore no appeal lies from its own judgment passed under this section—Ratanlal 691

Trial when ends —When a case is referred to under this section, the trial cannot be deemed to be concluded, until the High Court either convicts or acquits the prisoner—9 All. 420.

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prohixity, a Sessions Judge should be careful to be intelligible and precise in recording such opinions—*Cal G R & C O* p 26

The opinion of *all* the assessors should be taken Where the Judge took the opinion of two only of the assessors, the trial was illegal and not merely irregular—26 *Mad* 598

The opinion of each assessor is to be recorded in his own words—6 *P L J* 147

Again, each assessor should be required to state his opinion *individually* The Judge should not receive the *joint* opinion of all the assessors, delivered through one of them—9 *Cal* 875, 1887 *P R* 41

Where the accused is being tried on several charges, the assessors shall be required to give their opinion on *each* of the charges—22 *W R* 34 This is now made clear by the present amendment

The assessors are to give their opinions *orally*, and not in writing or in the form of a judgment—39 *Cal* 119

Consultation between assessors —There is no provision in this Code authorizing a Judge to allow or forbidding him from allowing consultation between the assessors aiding him in trying a case Though a Judge may allow one assessor to consult his co-assessors before giving his opinion, yet a refusal to allow such a course does not amount to any irregularity and the Judge is entitled to have before him each assessor's individual and *independent* opinion—2 *L W* 933

Grounds of opinion —It is very desirable that the assessors should be invited and encouraged by Judges to state briefly the grounds of their opinion as well as the result—2 *Bom L R* 322, 2 *Bom L R* 323 Assessors are appointed to aid the Judge in the trial and to give their opinion When the opinion formed by the Judge differs from the opinion formed by the assessors, he should always ascertain the grounds of the assessors' opinion—3 *W R* 6, 3 *W R* 21, 1905 *P R* 48

When opinion may be dispensed with —(1) When there is absolutely no evidence to show that the offence has been committed by the accused the Judge can abstain from taking the opinions of the assessors—2 *Weir* 388 See sec 289 But the Judge cannot do so simply because he considers the evidence unsatisfactory or untrustworthy—to *All* 414 (2) When the case is withdrawn by the Public Prosecutor with the consent of the Court, an acquittal should be recorded without taking the opinion of the assessors or whatever may be the reason—21 *Cal* 397

Reconsidering opinion —After a case has been taken by the assessors and after taking their opinion, the Judge has no power to reopen the matter and press upon the accused a confession in order to induce a conviction—6 *A W N* 2

Question to assessors —Prior to the present amendment, this section did not expressly authorise the Judge to put any questions to the assessors but if there was anything obscure in their opinion it was open to the Judge to put to them such questions as were necessary to elucidate or supplement their opinion—40 Cal 163, 41 Cal 350 This is now expressly provided by the present section as amended But the questions can be asked only after delivery of opinion and not before, and for no other purpose except to clear up any obscurity in the verdict The Judge can not put questions to the assessors by way of cross examination—*Ibid*

Recording opinion —It is of importance that the opinions of assessors, whether good, bad or indifferent, wise or foolish, should be recorded as they are expressed without any influence from the Judge, except such as may be reasonably exercised in the course of his summing up—6 A W N 22

Taking fresh evidence after opinion —When the opinions of the assessors have been taken the trial is at an end, except for the purpose of giving judgment The Judge has no legal authority to reopen a trial or recall witnesses, and cause fresh evidence to be summoned, and take a second and third opinion from the assessors—1888 P R 29, 15 All 136. Where after the assessors had given their opinion and had been discharged the Judge sitting alone took some further evidence in the case before writing judgment, the trial was held to be illegal and was set aside—43 All 25 It is the Judge together with the assessors that constitutes the Court, and not the Judge sitting alone, and all evidence must be recorded by the Judge before the assessors—*Ibid* In a trial for murder in which the soundness of the accused's mind was at issue, the Judge after taking the opinion of the assessors, reserved judgment and had a private interview with the Civil Surgeon as to the state of mind of the accused It was held that the procedure was extremely illegal Instead of discussing with the Civil Surgeon out of Court the Judge ought to have examined him as a witness in the presence of the assessors and the accused ought to have been given an opportunity of cross examining him—9 A W N 181

Judgment —In passing judgment the Judge is not bound to conform to the opinions of the assessors Although the assessors no doubt assist the Judge and regard must be paid to their opinion—24 Mad 523, still it is the Judge who has to decide the case on the facts as well as the law, and he is not bound by the assessors' opinion—14 Bom L R 710

The Judge should not import into his judgment the opinion of an assessor derived from personal knowledge and unsupported by evidence on record—24 W R 28

The Judge should form his opinion on the evidence at the trial, and not rely upon the views of the committing Magistrate—22 Cal 805

proximity, a Sessions Judge should be careful to be intelligible and precise in recording such opinions—*Cal G R & C O* p 26

The opinion of *all* the assessors should be taken Where the Judge took the opinion of two only of the assessors, the trial was illegal and not merely irregular—26 *Mad* 598

The opinion of each assessor is to be recorded in his own words—6 *P L J* 147

Again, each assessor should be required to state his opinion *individually* The Judge should not receive the *joint* opinion of all the assessors, delivered through one of them—9 *Cal* 875, 1887 *P R* 41

Where the accused is being tried on several charges, the assessors shall be required to give their opinion on *each* of the charges—22 *W R* 34 This is now made clear by the present amendment

The assessors are to give their opinions *orally*, and not in writing or in the form of a judgment—39 *Cal* 119

Consultation between assessors —There is no provision in this Code authorizing a Judge to allow or forbidding him from allowing consultation between the assessors aiding him in trying a case Though a Judge may allow one assessor to consult his co-assessors before giving his opinion, yet a refusal to allow such a course does not amount to any irregularity and the Judge is entitled to have before him each assessor's individual and *independent* opinion—2 *L W* 933

Grounds of opinion —It is very desirable that the assessors should be invited and encouraged by Judges to state briefly the grounds of their opinion as well as the result—2 *Bom L R* 322, 2 *Bom L R* 323 Assessors are appointed to aid the Judge in the trial and to give their opinion When the opinion formed by the Judge differs from the opinion formed by the assessors, he should always ascertain the grounds of the assessors' opinion—3 *W R* 6, 3 *W R* 21, 1905 *P R* 48

When opinion may be dispensed with —(1) When there is absolutely no evidence to show that the offence has been committed by the accused the Judge can abstain from taking the opinions of the assessors—2 *Weir* 368 See sec 289 But the Judge cannot do so, simply because he considers the evidence unsatisfactory or untrustworthy—10 *All* 414 (2) When the case is withdrawn by the Public Prosecutor with the consent of the Court, an acquittal should be recorded without taking the opinion of the assessors, or whatever may be their opinion—*Ratanlal* 307

Reconsidering opinion —After once summing up the case to the assessors and after taking their opinion, the Judge has no power to reopen the matter and press upon the attention of the assessors a part of the accused's confession, in order to induce them to change their opinion—6 *A W. N* 22

Question to assessors —Prior to the present amendment, the section did not expressly authorize the Judge to put any questions to the assessors, but if there was anything else in their opinion it was open to the Judge to put to them such questions as were necessary to elucidate or supplement their opinion—43 Cal. 113, 41 Cal. 350. This is now expressly provided by the present section as amended. But the questions can be asked only after delivery of opinion and not before, and for no other purpose except to clear up any obscurity in the verdict. The Judge cannot put questions to the assessors by way of cross examination—*Ibid*.

Recording opinion —It is of importance that the opinions of assessors, whether good, bad or indifferent, wise or foolish, should be recorded as they are expressed without any influence from the Judge, except such as may be reasonably exercised in the course of summarizing up—6 A. W. N. 22.

Taking fresh evidence after opinion —When the opinions of the assessors have been taken the trial is at an end, except for the purpose of giving judgment. The Judge has no legal authority to reopen a trial or recall witnesses, and cause fresh evidence to be summoned, and take a second and third opinion from the assessors—1888 P. R. 29, 15 All. 136. Where after the assessors had given their opinion and had been discharged the Judge sitting alone took some further evidence in the case before writing judgment, the trial was held to be illegal and was set aside—43 All. 25. It is the Judge together with the assessors that constitutes the Court, and not the Judge sitting alone, and all evidence must be recorded by the Judge before the assessors—*Ibid*. In a trial for murder in which the soundness of the accused's mind was at issue, the Judge after taking the opinion of the assessors, reserved judgment and had a private interview with the Civil Surgeon as to the state of mind of the accused. It was held that the procedure was extremely illegal. Instead of discussing with the Civil Surgeon out of Court the Judge ought to have examined him as a witness in the presence of the assessors and the accused ought to have been given an opportunity of cross examining him—9 A. W. N. 181.

Judgment —In passing judgment the Judge is not bound to conform to the opinions of the assessors. Although the assessors no doubt assist the Judge and regard must be paid to their opinion—24 Mad. 523, still it is the Judge who has to decide the case on the facts as well as the law, and he is not bound by the assessors' opinion—14 Bom. L. R. 710.

The Judge should not import into his judgment the opinion of an assessor derived from personal knowledge and unsupported by evidence on record—24 W. R. 28.

The Judge should form his opinion on the evidence at the trial, and not rely upon the views of the committing Magistrate—22 Cal. 805.

The judgment must be recorded But failure to record judgment does not invalidate the trial, but is only an irregularity curable by sec 537 — 2 Weir 397

The judgment must contain all the particulars specified in sec 367, even though the trial is held with the aid of jurors as assessors A reference to the heads of the charges to the jury is not sufficient — Ratanlal 426

The judgment must be recorded by the Judge who held the trial Where after the assessors had given their opinion the Judge left the district without recording his judgment and his successor after considering the evidence recorded at the trial convicted and sentenced the accused the conviction was set aside and a retrial ordered — 21 W R 47

Recalling assessors after discharge — When the opinions of the assessors have been taken, and they have been discharged, the Judge can not recall them or amend the charge or convict the accused on the amended charge — 1 W R 40

Cancellation of trial — The accused were committed to the Sessions on a certain charge At the commencement of the trial two more charges were added The trial then proceeded up to the point where the assessors opinion was taken The Judge reserved judgment but in writing it, he was of opinion that one of the charges was improperly added, and he therefore cancelled the trial and held a fresh trial It was held that the second trial was invalid because the trial Judge had no authority to cancel or set aside the trial which had been originally held, and the assessors opinion having been recorded, he had no option but to give his judgment in accordance with this section — 17 BOM L R 1074

1—Procedure in Case of Previous Conviction

310 *In the case of a trial by a jury or with the aid of assessors when the accused is charged with an offence and further charged that he is by reason of a previous conviction liable to enhanced punishment or to punishment of a different kind for such subsequent offence, the procedure prescribed by the foregoing provisions of this Chapter shall be modified as follows, namely —*

- (a) *Such further charge shall not be read out in Court and the accused shall not be asked to plead thereto nor shall the same be referred to by the prosecution, or any evidence adduced thereon unless and until*

- (1) *he has been convicted of the subsequent offence, or*
- (ii) *the jury have delivered their verdict, or the opinions of the assessors have been recorded, on the charge of the subsequent offence*
- (b) *In the case of a trial held with the aid of assessors, the Court may, in its discretion, proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction*

Change—The whole section has been redrafted by the Cr P C. Amendment Act, 1923. The old section stood as follows—

“310 In the case of a trial by jury or with the aid of assessors, where the accused is charged with an offence committed after previous conviction for any offence, the procedure laid down in sections 271, 286, 305, 306, and 309 shall be modified as follows

- (a) The part of the charge stating the previous conviction shall not be read out in Court, nor shall the accused be asked whether he has been previously convicted as alleged in the charge unless and until he has either pleaded guilty to, or been convicted of, the subsequent offence
- (b) If he pleads guilty to or is convicted of, the subsequent offence he shall then be asked whether he has been previously convicted as alleged in the charge
- (c) If he answers that he has been so previously convicted the Judge may proceed to pass sentence on him accordingly, but, if he denies that he has been so previously convicted, or refuses to or does not, answer such question, the jury or the Court and the assessors (as the case may be) shall then hear evidence concerning such previous conviction, and in such case (where the trial is by jury), it shall not be necessary to swear the jurors again.

It should be noted that clause (b) of the present section is entirely new. This clause has been added in order to avoid the inconvenience which may at present arise in cases tried by assessors whose opinion is not binding on the Judge. Under the amendment, in any trial held with the aid of assessors, the Court is given a discretion to proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction—*Statement of Objects and Reasons* (1914)

Object of section—The object of this section in prohibiting the proof of previous conviction to be put in until the accused is

convicted, is to prevent the accused from being prejudiced at the trial. Therefore where in the course of a trial a witness was allowed to say that he had heard that the accused was an old offender, the verdict was set aside, because the improper statement of the witness might have influenced the verdict of the jury—10 A W N 12. A Judge's direction to the jury to consider proof of previous conviction as evidence regarding the character of the prisoner amounts to a misdirection—5 CAL 768. But where no failure of justice was caused i.e. where the accused was not prejudiced (e.g. in a *prima facie* case of theft), the High Court refused to interfere in a case in which the accused was called upon to plead simultaneously to a charge of theft and previous conviction—13 C L R 110.

Previous conviction—The previous conviction referred to in this section must be a conviction within British India. A conviction outside British India (e.g. in Berar) does not fall within the purview of this section, and cannot be taken into account for the purpose of affecting the punishment on a second conviction in British India. But it is not absolutely improper, however, to take such conviction into consideration—7 C P. L R 24.

The charge alleging the previous conviction need not show the amount of the former punishment—4 M H C R App 11.

When previous conviction can be proved—It is most essential that the rules laid down in this section should be followed with precision and regularity and close attention—10 A W N 12, and proof of previous conviction should be put in only after the trial is concluded—3 W R 38, 6 A W N 47. The jury ought to be informed that the accused is charged with previous convictions only *after* their verdict is taken and never before—2 Weir 393. And the record should invariably shew that reference to previous conviction has not been made until the subsequent offence has been found proved against the accused—12 C L R 555.

How to prove—If the accused admits that he had been previously convicted, the Judge is justified under this section in passing sentence upon such admission—28 Cal 689, 1916 M W N 327. But if he does not plead to the charge of previous conviction, it cannot be proved by an extract from the record of previous conviction without proof of identity—2 Weir 393, 15 W R 53. An examination of the accused in respect of those convictions would be without legal warrant or justification, because it is not competent for a Magistrate to question an accused under sec 342 before his conviction, about his previous conviction—28 Bom 129, 28 Cal 689. See also notes under section 511.

311. Notwithstanding anything in the last foregoing section, evidence of the previous conviction may be given at the trial for the subsequent offence, if the fact of the previous conviction is relevant under the provisions of the Indian Evidence Act 1872.

When evidence of previous conviction may be given.

J.—List of Jurors for High Court, and summoning Jurors for that Court.

312. The names of not more than four hundred persons shall at any one time be entered in the special jurors' list.

Number of special jurors.

312. The High Court may prescribe the number of persons whose names shall be entered at any one time in the special jurors' list, provided that no definite number of Europeans or of Americans or of Indians shall be so prescribed.

Number of special jurors

This section has been redrafted by the Criminal Law Amendment Act, 1923. The reason of this amendment is thus stated: "The High Court special jury list should in our opinion be revised and it should no longer be limited to 200 Europeans and 200 non Europeans. It should include all who are qualified, to whatever nationality they may belong. This revision will probably increase the proportion of non Europeans in the list. This proposal involves the amendment of section 312 of the Code"

—*Report of the Racial Distinctions Committee, Para 25*

313 (1) The Clerk of the Crown shall, before the first day of April in each year, and subject to such rules as the High Court from time to time prescribes, prepare—

Lists of common and special jurors.

(a) a list of all persons liable to serve as common jurors, and

(b) a list of persons liable to serve as special jurors only.

(2) Regard shall be had, in the preparation of the latter list, to the property, character and education of the persons whose names are entered therein.

(3) No person shall be entitled to have his name entered in the special jurors' list merely because he may have been entered in the special jurors' list for a previous year.

(4) The Governor General in Council *or the Local Government* in the case of the High Court at Fort William in Bengal, and in the case of other High Courts the Local Government, may exempt any salaried officer of Government from serving as a juror.

(5) The Clerk of the Crown shall, subject to such rules as aforesaid, have full discretion to prepare the said list as seems to him to be proper, and there shall be no appeal from or review of his decision.

The drawing up of the list of special jurors is entirely in the discretion of the Clerk of the Crown and the Court will not interfere—1 Ind Jur. (N. S.) 106.

314. (1) Preliminary lists of persons liable to serve as common jurors and as special jurors respectively signed by the Clerk of the Crown shall be published once in the local official Gazette before the fifteenth day of April next after their preparation.

(2) Revised lists of persons liable to serve as common jurors and special jurors, respectively, signed as aforesaid, shall be published once in the local official Gazette before the first day of May next after their preparation.

(3) Copies of the said lists shall be affixed to some conspicuous part of the Court-house.

315. (1) Out of the persons named in the revised lists aforesaid, there shall be summoned for each session *in the town which is the usual place of sitting of each High Court, as many of those who are liable to serve on special or common juries respectively as the Clerk of the Crown considers necessary.*

(2) No person shall be so summoned more than once in six months unless the number cannot be made up without him.

(3) If, during the continuance of any sessions, it appears that the number of persons so summoned is not sufficient, such number as may be necessary of other persons liable to serve as aforesaid shall be summoned for such sessions

Supplementary summons The words in the town 'High Court' have been substituted for the words in each Presidency town' A similar amendment has been made in sec 316 and in the third proviso of section 276

316 Whenever a High Court has given notice of its intention to hold sittings at any place outside the town which is the usual place of sitting of such High Court for the exercise of its original criminal jurisdiction the Court of Session at such place shall, subject to any direction which may be given by the High Court, summon a sufficient number of jurors from its own list, in the manner hereinafter prescribed for summoning jurors to the Court of Session

Summoning jurors outside the presidency towns The italicised words have been substituted for the words 'Presidency town' Similar amendment occurs in secs 276 and 315

317 (1) In addition to the persons so summoned as jurors the said Court of Session shall, if it thinks needful, after communication with the Commanding Officer, cause to be summoned such number of commissioned and non commissioned officers in Her Majesty's Army resident within ten miles of its place of sitting as the Court considers to be necessary to make up the juries required for the trial of persons charged with offences before the High Court as aforesaid

Military jurors (2) All officers so summoned shall be liable to serve on such juries notwithstanding anything contained in this Code but no such officer shall be summoned whom his Commanding Officer desires to have excused on the ground of urgent military duty, or for any other special military reason

318 Any person summoned under S 315, S 316, or S 317, who, without lawful excuse, fails to attend as required by the summons,

Failure of jurors to attend

or who, having attended, departs without having obtained the permission of the Judge, or fails to attend after an adjournment of the Court after being ordered to attend, shall be deemed guilty of a contempt and be liable, by order of the Judge, to such fine as he thinks fit ; and, in default of payment of such fine, to imprisonment for a term not exceeding six months in the civil jail until the fine is paid :

Provided that the Court may in its discretion remit any fine or imprisonment so imposed.

K.—List of Jurors and Assessors for Court of Session, and summoning Jurors and Assessors for that Court.

319. All male persons between the ages of twenty-one and sixty shall, except as next herein-
Liability to serve as jurors or assessors. after mentioned, be liable to serve as jurors or assessors at any trial held within the district in which they reside, or, if the Local Government, on consideration of local circumstances, has fixed any smaller area in this behalf, within the area so fixed.

Where the Sessions Judge of Kanara asked the High Court for special permission to hold his Court at Sirsi instead of at Karwar, the High Court declined to permit it as no assessors could be called upon to attend at Sirsi, which was outside the area fixed.—Ratanlal 304.

320. The following persons are exempt from liability to serve as jurors or assessors, namely :—

- (a) officers in civil employ superior in rank to a District Magistrate ;
- (b) salaried Judges ;
- (c) Commissioners and Collectors of Revenue or Customs ;
- (d) police-officers and persons engaged in the Preventive Service in the Customs Department ;
- (e) persons engaged in the collection of the revenue whom the Collector thinks fit to exempt on the ground of official duty ;
- (f) persons actually officiating as priests or ministers of their respective religions ;

- (c) persons in Her Majesty's Army, except when, by law in force for the time being, they are specially made liable to serve as jurors or assessors ,
- (h) surgeons and others who openly and constantly practice the medical profession ,
- (i) legal practitioners (as defined by the Legal Practitioners' Act, 1879), in actual practice ,
- (j) persons employed in the Post Office and Telegraph Departments ,
- (k) persons exempted from personal appearance in Court under the provisions of the Code of Civil Procedure, Ss 640 and 641 ,
- (l) other persons exempted by the Local Government from liability to serve as jurors or assessors

321 (1) The Sessions Judge, and the Collector of the district or such other officer as the Local Government appoints in this behalf, shall prepare and make out in alphabetical order a list of persons liable to serve as jurors or assessors and qualified in the judgment of the Sessions Judge and Collector or other officer as aforesaid to serve as such, and not likely to be successfully objected to under S 278, clauses (b) to (h), both inclusive

(2) The list shall contain the name, place of abode and quality or business of every such person , and, if the person is an European or an American, the list shall mention the race to which he belongs

In selecting jurors and assessors, the Sessions Judge should choose persons of an independent condition in life, men of judgment and experience—23 W R 35 But persons of high social position e.g a hereditary Raja should not be placed on the list or if put upon the list ought not to be summoned to serve as juror or assessor unless it were known that he would be willing to act as such—17 A W N 167

Assessors can only be chosen from the list prepared under this section—Ratanlal 304

said revised list or the said special list as seem to the Sessions Judge to be needed for trials by jury and trials with the aid of assessors at the said sessions, the number to be summoned not being less than double the number required for any such trial, *and including, where any accused person is an European or an American, as many Europeans or Americans as may be required for the purpose of choosing jurors or assessors for the trial.*

(2) The names of the persons to be summoned shall be drawn by lot in open court, excluding those who have served within six months unless the number cannot be made up without them ; and the names so drawn shall be specified in the said letter.

(3) *Where the accused requires and is entitled to be tried under the provisions of S 275, there shall be chosen by lot, in the manner prescribed by or under S 276, from the whole number of persons returned the jurors who are to constitute the jury until a jury containing the proper number of Europeans or Europeans and Americans or of Indians as the case may be, has been obtained.*

Provided that, in any case in which the proper number of Europeans or Americans cannot otherwise be obtained, the Court may, in its discretion for the purpose of constituting the jury, summon any person excluded from the list on the ground of his being exempted under S. 320

(4) *Where under the proviso to subsection (3), the Court proposes to summon as a juror any person in His Majesty's Army, the provisions of S 317 shall apply in like manner as they apply for the purpose of the summoning of military jurors for a trial under S. 316.*

The italicised words have been added by the Criminal Law Amendment Act, 1923

Sections 326 and 327 Cr. P. C. contemplate as the ordinary or normal procedure that all assessors should be summoned on the first day on which a criminal Session commences, however many trials it may be proposed to hold in the course of that Session—17 Cr. L. J. 17 (All).

The duty of issuing a precept to the District Magistrate to summon jurors and assessors is imposed upon the Sessions Judge himself, it cannot be performed by a Subordinate Judge in temporary charge of the current duties of the Court of Session—Ratanlal 148

Where owing to the fact that only three jurors attended the Court, the Judge summoned jurors from among the residents of the town on the day fixed for the trial, *held* that the jury as constituted was not a proper jury and the fact that the Judge instead of selecting jurors from among those who were summoned in accordance with the provisions of Sec 326 chose persons specially selected (a thing which the Legislature has taken special pains to render impossible), was a serious irregularity which could not be cured by Sec 537—7 C W N 188

327. The Court of Session may direct jurors or assessors to be summoned at other periods than the period specified in S 326, when the number of trials before the Court renders the attendance of one set of jurors or assessors for a whole session oppressive or whenever for other reasons such direction is found to be necessary.

Power to summon another set of jurors or assessors

328 Every summons to a juror or assessor shall be in writing, and shall require his attendance as a juror or assessor, as the case may be, at a time and place to be therein specified

Form and contents of summons

329 When any person summoned to serve as a juror or assessor is in the service of Government or of a Railway Company, the Court to serve in which he is so summoned may excuse his attendance if it appears on the representation of the head of the office in which he is employed that he cannot serve as a juror or assessor, as the case may be, without inconvenience to the public

When Government or Railway servant may be excused

330 (1) The Court of Session may for reasonable cause excuse any juror or assessor from attendance at any particular session

Court may excuse attendance of juror or assessor.

Court may relieve special jurors from liability to serve again as jurors for twelve months.

(2) The Court of Session may, if it shall think fit, at the conclusion of any trial by special jury, direct that the jurors who have served on such jury shall not

be summoned to serve again as jurors for a period of twelve months.

331. (1) At each session the said Court shall cause to

List of jurors and assessors attending.

be made a list of the names of those who have attended as jurors and assessors at

such session.

(2) Such list shall be kept with the list of the jurors and assessors as revised under S. 324.

(3) A reference shall be made in the margin of the said revised list to each of the names which are mentioned in the list prepared under this section.

332. (1) Any person summoned to attend as a juror or as an assessor who, without lawful excuse,

Penalty for non-attendance of juror or assessor.

fails to attend as required by the summons, or who, having attended, departs

without having obtained the permission of the Court, or fails to attend after an adjournment of the Court, after being ordered to attend, shall be liable by order of the Court of Session to a fine not exceeding one hundred rupees.

(2) Such fine shall be levied by the District Magistrate by attachment and sale of any moveable property belonging to such juror or assessor within the local limits of the jurisdiction of the Court making the order.

(3) For good cause shown, the Court may remit or reduce any fine so imposed.

(4) In default of recovery of the fine by attachment and sale, such juror or assessor may, by order of the Court of Session, be imprisoned in the civil jail for the term of fifteen days, unless such fine is paid before the end of the said term.

Gentlemen on the jury 1st are under no obligation to notify their change of address to the Court before leaving their usual place of residence, or to make any arrangement for the acceptance of notice and for the giving of information to the Court that he would be unable to attend. Therefore where summons was served by affixing the duplicate on the door of the dwelling house of a juror, who at the time was living away from home, and had no knowledge of such service, *held* that he was not liable to fine for non attendance—6 C W N 887

The issue of summons to a juror by a registered letter is illegal, and no fine can be imposed for non attendance in such a case—1 C W N cxvi

The order of a Sessions Judge under this section fining an assessor is not appealable—8 W R 81

L—Special Provisions for High Courts

333 At any stage of any trial before a High Court under this Code, before the return of the verdict, the Advocate General may, if he thinks fit, inform the Court on behalf of Her Majesty that he will not further prosecute the defendant upon the charge and thereupon all proceedings on such charge against the defendant shall be stayed and he shall be discharged of and from the same. But such discharge shall not amount to an acquittal unless the presiding Judge otherwise directs

Power of Advocate-General to stay prosecution

Nolle prosequi—After the trial had commenced and the evidence partly gone into the Judge retired from the case under sec 556 as he was a share holder of the prosecuting Bank and the case was adjourned without the jury being discharged. The Chief Justice purporting to act under Cl 13 of the Charter Act appointed another Judge to preside at the trial of the accused. In answer to a question by the Judge the Standing Counsel intimated that he intended proceeding with the trial from the point where it had been left whereupon it was contended on behalf of the accused that the presiding Judge could not proceed with the trial as the previous Judge and the jury empanelled before him had still the seisin of the case. The Advocate General thereupon in order to get rid of the many difficulties arising out of the case entered a *nolle prosequi*, and the accused was discharged—2 C W N 481. In another Calcutta case the jury in the first trial returned a unanimous verdict of not guilty

abettor in the commission thereof

Provided that, where the offence is under inquiry or trial, no Magistrate of the first class other than the District Magistrate shall exercise the power hereby conferred unless he is the Magistrate making the inquiry or holding the trial, and, where the offence is under investigation, no such Magistrate shall exercise the said power unless he is a Magistrate having jurisdiction in a place where the offence might be inquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof

(14) Every Magistrate who tenders a pardon under sub-section (1) shall record his reasons for so doing, and shall, on application made by the accused, furnish him with a copy of such record

Provided that the accused shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost

(2) Every person accepting a tender under this section shall be examined as a witness in the case

(2) Every person accepting a tender under this section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial if any

(21) In every case where a person has accepted a tender of pardon and has been examined under sub-S (2) the Magistrate before whom the proceedings are pending shall if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court as the case may be

(3) Such person if not on bail shall be detained in custody until the termination of the trial by the Court of Session or High Court, as the case may be

(3) Such person unless he is already on bail shall be detained in custody until the termination of the trial

(4) (Omitted)

CHANGE—This section has been amended by section 86 of the Criminal Procedure Code Amendment Act 1921. The principal changes introduced are the following:—

(1) The old section was restricted to offences triable by the High Court or the Court of Session; the new section includes several other offences.

(2) A change has been made as regards the Magistrates who can tender pardon. The Magistrates who should be allowed to tender a pardon should, in our opinion, be Magistrates of the first class who are enquiring into the offence and any District Magistrate, Presidency Magistrate, Sub-divisional Magistrate or, with the sanction of the District Magistrate, a Magistrate of the first class, having jurisdiction in any place where the offence ought to be enquired into or tried.—*Report of the Joint Committee (1922)*

(3) The power to tender a pardon should be exercisable during an investigation as well as after a magisterial inquiry has begun. *Ibid.*

(4) Subsection (b) of the old section which has now been omitted runs as follows:—

(4) Every Magistrate other than a Presidency Magistrate who tenders a pardon under this section shall record his reasons for so doing and when any Magistrate has made such tender and examined the person to whom it has been made, he shall not try the case himself although the offence which the accused appears to have committed may be triable by such Magistrate.

The first part of this sub-section has now been re-enacted as sub-section (1 A) and the latter part has been omitted as unnecessary in view of the new sub-section (2 A). See the *Report of the Select Committee of 1916*.

OFFENCES—The old section applied only to offences triable exclusively by the Court of Session—3 B H C R 59 25 MAD 61 10 BOM 190 1 LAH 102 2 P 1 F 125 22 Cr I I 676. These cases are now rendered obsolete by reason of the change made in this section.

But where several offences are being enquired together the fact that some of the offences do not fall under this section will not debar the Magistrate from granting pardon in respect of the offences which fall under it. All that the Section requires is that the offence in respect of which pardon is tendered must be an offence described therein—9 S J R 43 1915 P R 17.

PARDON WHEN CAN BE TENDERED—Under the old section a pardon can be tendered only in an *enquiry* (see the words 'offence under inquiry') but not during an *investigation*—46 BOM 61. Under the present section it can be tendered at any stage of the investigation as well. See 3 LAH 431 where the same view has been taken although it is decided under the old section.

A pardon may be tendered to a person even after a charge has been framed against him—22 Cr. L. J. 255 (LAL). A pardon can be tendered to an approver during the course of an inquiry even though the principal offender has absconded and the trial cannot therefore proceed. In such a case the approver's statement will be recorded under Sec. 312 of the Code—46 BOM. 120.

WHO CAN GRANT PARDON—See notes under 'charge' above. Where the offence is under investigation the Magistrate (other than the District Magistrate) tendering pardon must have jurisdiction over the offence. A Magistrate of one district cannot tender pardon to a person implicated in an offence committed in another District and inquired into the latter District. The pardon so tendered is illegal and cannot be validated by the operation of Sec. 529—20 ALL. 40.

Where the offence is under investigation the Magistrate can grant pardon only with the sanction of the District Magistrate. This sanction should be a written sanction but an *oral* sanction though irregular would be valid—5 A. L. J. 691.

A Deputy Commissioner trying a case triable exclusively by the Sessions Court under powers conferred by Sec. 30 can offer a conditional pardon to an accused under this section—10 C. W. N. 847.

The *Local Government* has no power to offer a conditional pardon to an accused for the purpose of giving evidence against the other accused under this section—10 C. W. N. 847, 33 C.W. 1353. But the Local Government as an executive authority has power to refrain from prosecution independently of this section—21 A. L. J. 12.

CAN PERSON SUPPOSED **INQUIRY**—The word 'supposed' must be taken as intended to exclude merely the case of a man who has actually been *convicted* of the crime and not the case of a man who though admitted to be a party to the crime is unconvicted; therefore where pardon was tendered to a person who pleaded guilty but was not convicted it was held that the pardon was properly granted and that his evidence was admissible—7 ALL. 160, Ratnoid 750.

CONDITION OF PARDON—The Court when tendering pardon to an accomplice should explain to him the condition on which it is tendered. If he does not accept the condition the trial will proceed as if no such tender was made and if he accepts it it is the duty of the Court to examine him as a witness and then if the Court be of opinion that he has not complied with the condition of the pardon the Court may commit him or direct him to be committed for trial upon the charge in respect of which the pardon was tendered (section 339)—12 W. R. 80.

The only condition on which pardon can be tendered to an accused person is the one specified in this section. By the tender of pardon there should be no temptation offered to deviate from the truth. A tender of pardon on condition that the approver should testify to

having been present at the scene of the offence and to have personal knowledge of the circumstances under which the offence was committed is illegal—Ratanul 612

SECTION 111 OF PARDON—A person who has been granted pardon under this section and who has fulfilled the conditions of pardon must be released and cannot be re-arrested in respect of the same offence or for any offence inseparably connected with it. Thus in a dacoity case in which pardon was tendered under this section. He made a full statement implicating himself and others, pointed out the place where he had carbine and ammunition concealed, gave them up to the Police and in all respects complied with the conditions of the pardon. At the close of the case he was released. He was then re-arrested and tried under section 20 of the Arms Act in respect of the possession of the carbine and ammunition which he had given up to the Police. *Held* that the possession of carbine and ammunition being an offence in connection with the matter of the dacoity and inseparable from his guilt is a direct consequence of his participation in such an offence after he had fulfilled his condition of pardon in the dacoity case was improper and must be set aside—19 A. L. J. 717

SUBSECTION (1 A)—RECORDING REASONS—Although subsection (1 A) requires the Magistrate who tenders pardon to record his reasons for so doing, still the recording of the reason is not a condition precedent to the tender of pardon and its acceptance by the approver and the pardon cannot be set aside merely because the reasons are not recorded—13 Cr. L. J. 388 (ALL.) When the facts which led up to the tender of pardon appear on the record, the omission to state the reasons is not an illegality which vitiates the proceedings—36 Cr. L. 629 nor even can it be a ground for excluding the approver's evidence as inadmissible—5 Cr. L. 224

SUBSECTION (2)—*Approver is witness*—According to clause (2) the approver shall be examined as a witness in the case. The expression "in the case" (see odd section) includes preliminary inquiry and does not refer to the trial alone—21 MAD 421

Under the old law it was not *compulsory* to examine the approver in the Sessions Court, the Magistrate was not bound to send him as a witness to the Sessions Court if he showed by his evidence in the Magistrate's Court that he was an untrustworthy witness—42 Cr. L. 556. But under the present section the approver must be examined as a witness in the subsequent trial.

But where an approver when examined in the preliminary inquiry keeps back material evidence within his knowledge, the Magistrate can withdraw the pardon and the prosecution is not bound to put him forward as a witness in the sessions trial—21 MAD 421. A person who has not satisfied the conditions of pardon at the commitment need not be examined at the trial in the Sessions Court, the evidence

given by him before the committing Magistrate can be used as evidence in proceedings taken against him—1 U B R (Cr P C,) 7, 1905 P R 41 See notes under Sec 339

ACCUSED ILLEGALLY PARDONED—It is illegal for a Magistrate to convert an accused into a witness (approver) except when a pardon has been lawfully granted under Sec 337—1 BOM. 610 Therefore where a Magistrate tenders pardon to one of the accused persons in a case not exclusively triable by the Court of Session, and examines him as a witness the statement made by that accused is irrelevant and inadmissible as evidence, and such a statement is inadmissible even as confession of a co-accused—2 ALL 260; 10 BOM 190 Contra—25 MAD 61

CONVICTION BASED ON APPROVER'S EVIDENCE—Though a conviction is not illegal merely because it proceeds on the uncorroborated testimony of an approver, (Sec 133 Evidence Act) 7 ALL 160 5 W. R 80, 1 MAD 394; yet it is unsafe to convict a person upon such testimony—19 W R 68, 20 W R 19 A conviction is bad in law if the accused has been convicted on a retracted statement made by him under promise of pardon which so far from being corroborated by any other evidence whatsoever was contradicted in important particulars by other prosecution evidence—1916 P W R 6 And the Judge in his charge to the jury should take care to point out that although a conviction based on the uncorroborated testimony of the approver is not illegal yet it is not the practice of the Court so to convict and should state also that the evidence of the approver was given on conditional pardon—10 W R 17 29 CAL 782 But when the Judge had warned the jury of the danger of convicting the accused on the uncorroborated testimony of the approver, and the jury, notwithstanding the Judge's remarks, convicted the accused it was held that the conviction was valid in law, and could not be questioned by the High Court—15 W R 37, 6 B L R 108

As to the amount of corroboration necessary, no hard and fast rule can be laid down, it depends upon the nature of the crime, on the extent of the complicity of the accused and the nature of the corroborative facts—28 CAL 419 It is sufficient if the approver's evidence is corroborated in some of the leading circumstances of the story, so that the Court may be able to presume that he had told the truth as to the rest—11 W R 21 The evidence of the approver should be corroborated not only as to the circumstances of the case, but also as to the identity of the prisoner—3 H H C R 67 1 BOM 175, 10 BOM 319 and also in material particulars as to the person having committed the crime—21 W R 69 1 N 550 The corroboration should be such as to support the statement of the approver's testimony and to show that the accused was present

at the scene of the offence and participated in the acts of commission—
19 W R 16

SECTION (3) —The approver shall be unless he is on bail detained until the termination of the trial—S L R R 357, and nothing can be done against an approver who has not complied with the conditions on which the tender of pardon was made to him until after the case in the Court of Session has been finished, then his trial should be commenced *de novo*—23 BOM 493 13 C P L R 123 See notes under sec 339

338 At any time after commitment but before judgment is passed the Court to which

Power to direct ten the commitment is made may, with der of pardon

the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in or privy to any such offence tender, or order the committing Magistrate or the District Magistrate to tender, a pardon on the same condition to such person

Who can tender pardon —After the commitment of the case to the Sessions either the Court of Session can itself tender pardon or it can direct the Committing Magistrate or the District Magistrate to tender pardon The Local Government cannot tender a pardon under this or the previous section but it can withdraw the prosecution under sec 494—33 CAL 1333 10 C W N 847

The Sessions Court can direct only the Committing Magistrate or the District Magistrate to tender pardon but it cannot direct a Police Officer to do so—6 W R (Cr Let) 5

The Magistrate directed to tender pardon must obey the direction and tender pardon to the approver though he may be of opinion that there is sufficient evidence on the record to justify a conviction—6 W R (Cr Let) 5

To whom pardon can be tendered —Pardon can be tendered under this section to an *accused* There is no ground for the suggestion that the words 'any person in this section do not include a person accused before the Sessions Judge—9 S L R 41 Pardon can be tendered to an accused person provided he is *unconvicted* The words "supposed offence" in this section exclude those who have been actually convicted but a tender of pardon to a person who has pleaded guilty but has not been convicted is not prohibited by this section and the evidence of such person examined as a witness is admissible—7 ALL 160 Ratanlal 750

When pardon may be tendered —Pardon can be tendered at any time after commitment and before judgment is pronounced but it is extremely improper though not illegal to grant pardon at a later

stage of the trial after the close of the prosecution and the defence, and after the opinion of assessors had been given though judgment had not yet been pronounced—4 A W N 147

339 (1) Where a pardon has been tendered under S 337 or S 338, and *the Public Prosecutor*

certifies that in his opinion any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter

Provided that such person shall not be tried jointly with any of the other accused, and that he shall be entitled to plead at such trial that he has complied with the conditions upon which such tender was made in which case it shall be for the prosecution to prove that such conditions have not been complied with

(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him when the pardon has been forfeited under this section

(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him *at such trial*

(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court

CHANGE.—The italicised words and the proviso have been added by the Criminal Procedure Code Amendment Act 1923

CERTIFICATE OF PUBLIC PROSECUTOR.—“We would make a certificate by the Public Prosecutor as the basis of the prosecution of a person who has accepted a tender of pardon.—*Report of the Joint Committee (1922)* Under the old law it was the trying court which was the authority to determine whether the pardon has been forfeited so as to necessitate the trial of the approver—1889 P R 6 1904 P R 31 12 CAL 850 Under the present law, no such determination by the trying court is necessary but the certificate of the Public Prosecutor is sufficient

FORFEITURE OF PARDON.—*What amounts to breach of condition of pardon*—The approver will be said to have broken the

conditions of pardon, if he wilfully conceals anything essential or gives false evidence—8 L. B. R. 357, 30 BOM 611

If after accepting the tender of pardon the approver refuses to make any statement saying that he knows nothing, his pardon will be revoked and he will be committed for trial—29 ALL. 24. The prosecution may proceed against the approver if he breaks the condition of his pardon by giving a false evidence under section 512 of the Code (in a case where the principal offender has absconded)—46 BOM 120. But absconding of the approver before conclusion of cross examination does not amount to wilful concealment of facts—8 L. B. R. 357.

But it is a matter of great importance that strictest faith should be kept with the approver and his mere failure to secure the conviction of his accomplices does not justify the withdrawal of pardon—1895 P. R. 15. He should be allowed to go free if he makes a fair full and true disclosure of all the circumstances within his knowledge relative to the commission of the crime. When the approver makes such a full disclosure and the whole of the evidence showed that the crimes were in all probability exactly as he said they were and there was no ground for supposing that he had concealed the name of any person concerned in the crime or had concealed the part which he himself took in the crime it was held that he had complied with the conditions of the pardon and the fact that there are slight inconsistencies upon immaterial points with previous statement made by him will not justify a forfeiture of pardon—12 C. L. R. 226. An approver who makes a full and true disclosure of facts both before the Committing Magistrate and the Sessions Court but resiles in cross examination from the statements made by him in examination-in-chief, sufficiently fulfils the conditions of his pardon and his pardon cannot be forfeited—30 BOM 611. Any trifling discrepancies elicited in cross examination do not justify the forfeiture of pardon—1902 P. R. 34.

NO WITHDRAWAL OF PARDON NECESSARY—The word 'forfeited' has been substituted in the 1898 Code for the word 'withdrawn' occurring in the 1882 Code. Under the present Code no formal withdrawal of a pardon and no formal declaration that the pardon has been forfeited are necessary—42 CAL. 76. 31 ALL. 395. 32 MAD 173, 30 BOM 611. 1918 P. R. 21, 7 L. B. R. 17. N. L. R. 65, the forfeiture is incurred *ipso facto* by the acts of the approver—37 CAL. 845. The substitution of the word 'forfeited' for 'withdrawn' indicates that a pardon cannot be withdrawn but can only be forfeited on the ground of the breach of the conditions. Under the present law the question is whether the accused has forfeited his pardon by some act of his own and not whether the Magistrate has validly withdrawn it—25 BOM 675. And no objection can be raised as to its validity if

the pardon has been withdrawn by an unauthorised Magistrate—1918 P R 24 Under the old law the pardon remained in force until it was formally withdrawn under the present law, the result of a failure to observe the conditions is that the approver may be put on his trial without any formal order of withdrawal or cancellation The act terminating the pardon was under the old law the withdrawal of pardon by the authority who granted it, under the present Act, it is the forfeiture by the approver—12 CAL 856

TRIAL OF THE APPROVER —*Commitment or trial along with other accused, illegal* —Sub section (3) of section 337 lays down that the approver shall be detained in custody until the termination of the trial by the Court of Session The effect of that section read with this section is that action can be taken against an approver, who has forfeited his pardon after the trial in the Court of Session is finished and then his trial should be commenced *de novo* If he has forfeited his pardon during the preliminary enquiry he cannot be committed to the Sessions along with the other accused—23 BOM 493, 4 BOM L R 825, 24 MAD 321, 31 MAD 272, 4 U B R 7, 5 N L R 134 (*Contra*—42 CAL 856, 20 ALL 529 29 ALL 21, 5 A L J 691, 25 BOM 675, in these cases it is held that the commitment of the approver along with the other accused is not illegal)

If the accused has forfeited his pardon during the trial he cannot be tried at once along with the other accused since he has not been regularly committed to the sessions, but has been sent up as a witness—14 ALL 336, 14 ALL 502 14 W R 10, 12 CAL 856 Ratanlal 119 1 LAH 218 In such a case the Sessions Judge should send him to a competent Magistrate for a regular commitment—19 W R 13 17 MAD 352, 14 ALL 336, 22 CAL 50 The approver should not be deprived of the benefit of a preliminary enquiry where he should have an opportunity of making his defence—3 MAD 351 This is now expressly provided for by the proviso newly added

Where the Judge sends up the approver to a Magistrate for commitment the committing Magistrate must in his commitment order give reasons for holding that the approver has forfeited his pardon—10 BUR L T 16 8 L B R 117

DETENTION IN CUSTODY —The Sessions Court is not justified as soon as the trial has closed of the offence with respect to which pardon has been tendered to an approver in sending the approver in custody to the Magistrate with a view to taking action against him for breach of the conditions of pardon The approver is entitled to be discharged as soon as the trial closes and action can be taken against him only by way of re-arrest—20 BOM 611 10 BUR L T 16 It is improper to keep the accused in further custody after the termination of the original trial—11 N L R 79 37 CAL 815

PLEA OF PARDON —See the proviso. The approver is entitled to plead both before the committing Magistrate and before the Sessions Judge in bar to his trial that he has fulfilled the conditions on which pardon was tendered to him—30 BOM 611 37 AIL 331, 1 LAH 218 10 BUR L R 46. The approver is entitled to plead the bar of pardon before the Sessions Judge although he had not done so before the committing Magistrate—37 AIL 331. Even though the committing Magistrate has decided against the approver it is open to him to plead his pardon again at the trial before the Judge—42 CAL 856 8 L B R 117 39 AIL 305.

Before an approver can be put on his trial on account of forfeiture of pardon he must be given an opportunity of meeting with the allegation of the prosecution that he has failed to make a full and true disclosure of the facts within his knowledge as required by sec 337. The mere expression of opinion by the Sessions Court that the person has not complied with the condition of the pardon is not sufficient—1889 P R 67 L B R 1. The proper course is to draw up an order setting forth specially the alleged breach of the condition of pardon and to call upon the approver to shew cause on a future date why he should not be tried for the offence in respect of which pardon was tendered. On the date fixed for the hearing unless the approver admits the alleged breach of the condition the Magistrate or Judge should hear the evidence relied upon as establishing the breach and any rebutting evidence which the approver may offer and should then record a definite finding as to whether there was a breach or not. A definite finding arrived at in this manner is essential before the approver can be placed on his trial for the original offence—7 L B R 1. Section 339A (newly enacted) now furnishes a procedure for the case.

The onus is on the prosecution to prove that the approver has forfeited his pardon—42 CAL 856 25 BOM 675 30 BOM 611 32 MAD 173.

SUBSECTION (3)—*P^{er} seculi a f r perjury*—When a pardon has been legally tendered to an accomplice and he breaks the condition of his pardon by making a retracted statement at the trial proper sanction is necessary for the prosecution on each branch of the alternative charge—10 BOM 190. Want of sanction is not a mere irregularity but is an illegality which vitiates the proceedings—1881 P R 42 27 CAL 137.

Sanction to prosecute should not be given merely on the ground that the approver contradicted himself before the committing Magistrate. A witness who is in any way induced to make a false statement in connection with a capital charge should be allowed every possible *locus penitentis*—11 A L J 964.

to be defended by a pleader—21 ALL 107, 23 CAL 493, 1900 P R 15, 25 ALL 375, 4 C W N 797 4 C L R 452 This is now made clear by subsection (1) of the present section

But a person complained against does not become an accused person within the meaning of this section until it has been decided to issue process against him Therefore a person complained against has no right to be represented by a pleader during a preliminary inquiry held under section 202 before issue of process—4 N L R 81 38 CAL 880, or during the proceeding when the Magistrate is considering the report of the local investigation ordered by him—21 C W N 127 But these cases are no longer good law, because a person against whom a complaint has been made may be said to be a person against whom a proceeding under this Code has been instituted within the meaning of subsection (1), although no process has been issued against him, and he has a right under the present section to be defended by a pleader

RIGHT OF ACCUSED TO BE DEFENDED BY PLEADER —

The accused has a right to choose his own pleader, and the Court is not entitled to tell him to appoint another pleader, because the pleader already engaged does not know how to behave in Court—Ratanlal 861 The Court has no power to forbid a duly qualified pleader to appear for the accused—Ratanlal 25

The accused has a right that the pleader engaged by him must be heard It is not a question of indulgence but of right It is an elementary principle of law that no order ought to be made to a man's prejudice without hearing him, and counsel must be heard before a final opinion is formed by the Court The Court has no discretion to refuse to hear the counsel—6 BOM L R 665 The Court cannot ask the pleader to sit down in the middle of the cross examination though it has power to disallow improper questions put by him—Ratanlal 25

It is the duty of the Magistrate to afford the accused and his friends every opportunity of making his defence, and he should not personally interpose in any way between them It is therefore improper for a Magistrate to refuse to allow the pleader engaged by the wife of an accused for his defence to have an interview with him or to appear and sit in Court—1 BOM L R 856

If the accused's pleader is not heard the conviction will be set aside—5 M L J 290

PLEADER APPOINTED BY COURT —The position of a pleader appointed by the Court to defend a prisoner is not the same as that of a pleader whom the accused has authorised to act for him Any admissions made by the former are not binding on the accused—2 BOM L R 771 (see Chapter sec. 271)

PRIVATE PLEADERS —Under sec. 4 (r) of the present Code, an accused person cannot claim as of right to be represented by a private person. But he may be represented by such person with the permission of the Court. The rulings in *1 B H C R 16* 1 *MAD 310* *Ratanlal 29* and *Ratanlal 1* (decided under the Codes of 1861 and 1872) which held that the accused had a right to engage any person as a pleader are no longer good law. Under the present Code permission of the Court is necessary in cases of private pleaders and mukhtears. But in permitting or not the appearance of private persons as pleaders a Magistrate should exercise a discretion in each case—2 *Weir 100*, and a general order that no private person would be allowed to appear in his Court is illegal. But an order excluding any particular individual in any particular case would be within the discretion of the Magistrate and therefore legal—2 *Weir 101*.

MUKHTEARS —The above remarks apply also to the case of Mukhtears. Under the old Code of 1872 the accused had a right to appear and be heard by a Mukhtear—6 *BOM 11*. But under sec. 4 (r) of the present Code a Mukhtear can appear only with the permission of the Court—1 *S. L. R. 35*. And to refuse to allow the appearance of a Mukhtear on behalf of the accused is entirely within the discretion of the Magistrate—*Ratanlal 314* 5 *M H C R APP 37*. But it is improper for a Magistrate to shut up the defence of the accused merely because he is represented by a Mukhtear, and a general order prohibiting Mukhtears to appear in Sessions Courts is illegal—38 *CAI 188*. Magistrates should not by the indiscriminate exclusion of persons who are invested by law with a distinct professional status in criminal trials deprive parties of legal aid which they can frequently obtain at a moderate cost.—*CAI 6 R* and *C O p 29*.

See the proposed amendment under notes to section 4 clause (r) by which Mukhtears will be placed on the same footing as pleaders and will be entitled to appear in all criminal courts without requiring any special permission.

341 If the accused though not insane cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial and in the case of a Court other than a High Court, if such inquiry results in a commitment, or if such trial results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

SCOPE OF SECTION —This section is intended to provide for cases where the accused is unable to understand the proceedings through

may, at any stage of any inquiry or trial without previously warning the accused put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them, but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed

(4) No oath shall be administered to the accused

SCOPE —The provisions of this section are general and applicable to trials in all cases viz, summons, warrant and Sessions trials—6 P L J 174, 5 P L J 430 Even if a case is tried summarily the accused should be examined—3 P L T 317 41 CAL 743

OBJECT OF EXAMINATION —The real object of the examination is to enable a Judge to ascertain from time to time from a prisoner particularly if he is undefended, what explanation he may desire to offer regarding any fact stated by a witness or after the close of the case how he can meet what the Judge may consider to be damning evidence against him—6 CAL 96 36 C L J 417 20 Cr I J 12 (Nag) And in order that the accused may explain all the facts appearing in evidence against him, it is necessary that his attention should be directed to all the vital parts of the evidence against him especially if he is an ignorant person who cannot be expected to know or understand what particular parts of the evidence are or are likely to be considered by the Court to be against him—20 Cr L J 12 (Nag)

The examination of the accused under this section is intended to enable the accused to explain any circumstances appearing against him and not to elicit answers calculated to supplement the case for the prosecution and to show that he is guilty—10 MAD 295 The object of the examination is not to drive the accused to make self incriminating statements—1 M H C R 109, 1 C L R 436 nor to make him confess his guilt or assist the prosecution by admitting facts which may go to criminate him—2 C W N 702 Nor is it

competent for a Court to examine the accused for the purpose of filling up gaps in the evidence for the prosecution—27 MAD 238, 36 MAD 457, 1915 M W N 113, 28 M L J 329, 26 CAL 49, 28 CAL 689, 4 L R R 244. Thus, where in a charge of defamation the prosecution was unable to prove that the accused made and published the defamatory matter, it is illegal for the Magistrate to examine the accused for the purpose of supplying this defect in the prosecution evidence—27 MAD 238. See also 3 L R R 208, where it was held that putting questions to the accused for the purpose of proving his identity, when such identity was not established by the prosecution evidence, was improper but not wholly illegal, Sec 537 curing the irregularity.

MODE OF EXAMINATION —In permitting the Court to examine the accused person from time to time the law does not contemplate that the examination of an accused person is to be conducted in the manner of cross-examination of an adverse witness by a counsel—6 CAL 96, 1 C L R 496 6 C L R 431 1 PAT 630 2 LAH 129, 3 P L T 649, 5 ALL 213, 10 CAL 140 18 Cr L J 941 (Bur). The Judge or Magistrate is not to establish a Court of Inquisition, and to force a prisoner to convict himself by making some incriminating admissions after a series of searching questions the exact effect of which he may not readily comprehend—6 CAL 96 2 LAH 129, 1 C L R 436, 6 C L R 431. It is highly improper to subject the accused to a very embarrassing and cruel series of questions intended rather to puzzle the accused than to elucidate the case or to enable him to furnish an explanation as to the circumstances appearing in evidence against him—6 ROM L R 91.

Where an accused is undefended the Magistrate should simply point out to him the elements of the evidence adduced against him, which seems in his own interest to demand his explanation where the accused is defended by a lawyer the tribunal should not enter upon a lengthy examination of the accused person which might easily develop into a recounting of the history of the whole case or into what would be far worse some sort of cross examination—3 P L T 649.

EXAMINATION IMPERATIVE —The provisions of this section are not permissive but imperative, the accused must be given an opportunity of explaining any circumstance appearing in the evidence against him—Ratanlal 100, Ratanlal 720 Ratanlal 710 10 BOM L R 201, 22 C W N 831. The word 'shall' shows that the provisions of this section are mandatory and not discretionary only—9 BOM L R 356, 1918 P R 1, 5 P L J 430, 1 P L T 641, 20 Cr L J 12 (NAG). The Sessions Judge is bound to examine the accused even

though he has been examined before the committing Magistrate—14 L W 418 9 BOM L R 730 In a summons case the Magistrate is bound to examine the accused under this section before convicting him—45 BOM 672, 46 BOM 441 6 P L J 174

Omission to examine the accused is not merely an error in form (2 Weir 405), but goes deeper into the case and vitiates the whole trial—17 BOM L R 892 15 BOM 672 25 C W N 609, 2 P L T 549, 6 P L J 147, 3 P L T 347, 36 C L J 417, 44 M L J 567 (T B), 27 C W N 389 20 Cr L J 12 The defect is not cured by Sec 537—1918 P R 1 5 P L J 430 1 P L T 641, U B R, (1917) 2nd Qr 18 If however, it is evident that the accused was not at all prejudiced by the omission the High Court will not interfere—20 A L J 874 2 Weir 405, 1 L B R 141 Thus where the accused persons were not examined under this section after the examination of the prosecution witnesses but they filed written statements at that stage and also after the examination of the defence witnesses, held that the accused not having been prejudiced and there having been no miscarriage of justice the High Court will not interfere in revision—1 PAT 31

When examination may be dispensed with —(1) The object of examination under this section is to enable the accused to explain any circumstance appearing in evidence against him but where the prosecution adduced no evidence against the accused the Magistrate is not justified in putting questions to the accused—9 MAD 224, 10 W R 25, 39 MAD 770

(2) When the accused has left the case entirely in the hands of his legal adviser the Judge need not ask the accused to explain any circumstances appearing in evidence against him—2 Weir 105

(3) Where the accused has been exempted from personal appearance under Sec 205 the Court may also dispense with his examination and may examine the pleader instead—6 S L R 206

TIME FOR EXAMINATION —The accused is to be examined after the evidence for the prosecution has been recorded. He can not be examined before any prosecution evidence has been heard or recorded, because there is nothing which he can be asked to explain at that stage—9 MAD 224 2 A W N 106 5 M L T 216 3 A W N 238

The accused is to be examined after the evidence for the prosecution has been closed and before he is asked to enter upon his defence—Ratanlal 227, 5 P L J 190 36 C L J 117 It is therefore wrong to put questions to the accused in the middle of the prosecution evidence with a view to supply any defect in such evidence—3 B H C R 51 It is unfair to the accused and contrary to law to examine the accused before the examination of the prosecution

witnesses is completed—15 Cr L J. 136 (M.L.) 2 P L T 741, 22 Cr L J. 708 (Pat)

Although it is discretionary with the Magistrate to examine an accused person 'at any stage of the inquiry or trial' i.e., before the case for the prosecution is concluded, still this would not absolve the Magistrate from the obligation imposed upon him by the latter part of subsection (1) to examine the accused after the witnesses for the prosecution have been examined and before he is called on for his defence—2 P L T. 519, 2 P L T 155

The accused must be examined after the examination, cross-examination and re-examination of all the prosecution witnesses are over. It is not enough that the accused has been examined after the examination-in-chief of the prosecution witnesses but before their cross-examination and re-examination. Until the prosecution witnesses have been cross-examined and re-examined it cannot be said what the exact case that the accused will have to meet is, and, if he is forced to disclose his defence before cross-examination it might very well be that the prosecution witnesses would be on their guard and the value of the cross-examination destroyed. The provision in Sec. 342 is for the benefit of the accused and to enable him to obtain the full benefit of the section it is clear that he must be examined after the cross-examination and re-examination of the prosecution witness are over—2 P L T 520, 6 P L J 644, 27 C W N 28, 49 CAL 1075, 15 MAD 820, 27 C W N 389 (*Serrant's Defamation case*). But where the accused does not cross-examine the prosecution witnesses after their examination-in-chief, and then the Magistrate examines the accused and frames a charge, and afterwards at a later stage the accused cross-examines the prosecution witnesses and then the prosecution re-examines them, *held* that the omission to further examine the accused after the cross-examination and re-examination of the prosecution witnesses does not vitiate the trial—44 M L J 567 *contra*—45 MAD 820

This section does not make it obligatory to again examine the accused after a charge has been added to or altered, when he has already been examined prior to the addition or alteration of the charge—1 PAT 51

WHO CAN EXAMINE—Only the Court conducting the trial or inquiry can examine the accused. Neither the complainant, nor the counsel for the prosecution nor any other person is authorised to put questions to the accused—10 MAD 121. See also C P Cr Cr., Part II, No. 24

DUTY OF COURT EXAMINING THE ACCUSED—When a Magistrate is examining a prisoner, he should refrain from assuming that

the prisoner is guilty of the crime with which he is charged. The proper mode is to tell the prisoner that he is charged with a certain offence, and to ask him if he has any explanation to give of the charge, and whether he wishes to make any statement—2 Weir 438

IMPROPER QUESTIONS —(1) It is objectionable to put questions to the accused in regard to the matter which he had previously mentioned in his confession and which he had repudiated as untrue—7 C W N 345

(2) It is improper to examine an accused about a confession which is inadmissible, and if he is examined about such a confession the question and the answers to them are not admissible in evidence against the accused—4 L B R 244

(3) It is improper to question the accused with regard to previous statements made by him when such statements have not been made legal evidence or brought on the record of the inquiry—9 MAD 244

(4) It is improper to ask questions to supplement the case for the prosecution or to fill up gaps in the evidence for the prosecution—9 MAD 244 see also notes above

(5) It is improper to put question to the accused to ascertain what witnesses the accused intends to call at the trial or what evidence they will give or what his defence is—11 ALL 242, 13 ALL 315, 27 MAD 238

(6) It is improper for a Magistrate to put question to the accused about his previous convictions either with a view to take them into consideration for the purpose of conviction or with a view to dispense with formal evidence as to the alleged previous convictions and as to the identity of the accused in the event of conviction—28 BOM 129, 28 CAL 689 But see 1 N L R 163

(7) It is not a sufficient compliance with the provisions of this section to ask the accused the general question "Have you anything more to say in the case? You have heard the prosecution witnesses against you. What have you to say?"—20 Cr L J 12 (Nag)

WRITTEN STATEMENTS —Though written statements can be put in and accepted by the Court, still they can not be allowed to take the place of the examination of the accused which this section orders to be made—42 CAL 97, 23 A W N 1 22 Cr L J 276 (Iah) 2 P L J 155 11 L W 118 1 P L J 122 The object of this section is to elicit answers from the accused in regard to certain matters and since written statements are generally drawn up by the legal advisers or friends of the accused and not by the accused themselves the practice of reading such written statements will defeat the object of this section—14 C W N 1011 10 Cr L J 9 (Cal) The promise to file written statements made at the time of the plea

does not exempt the Court from its duty of examining the accused under this section—27 C W N 389

Merely reading over to the accused a statement made by him and recorded under section 561 is not a compliance with this section—6 P. L. J. 147.

SUBSECTION (2) —Refusal to answer questions —The practice of refusing to answer questions in the Sessions Court and of putting written statements is a very pernicious practice. The refusal to answer questions may be attended with great risk to the accused, for the Court may draw from such refusal an inference adverse against the accused—19 C W N 1013

FALSE ANSWERS —The immunity from prosecution for perjury is limited to answers to questions put by the Court during the examination. The accused cannot escape liability if he makes false statements in an affidavit presented to the Court along with an application for transfer of the case—1 S L R 121, 12 O C 308. But in 12 MAD 451, an accused who made a false statement in his petition of appeal was held to be protected by this section since a criminal appeal is a continuation of the criminal case and the appellant has the privilege of the accused.

SUBSECTION (3) —When an accused person has been examined under this section the answers given by him may be taken into consideration at the trial and proper inferences drawn therefrom, and even in a subsequent trial for any other offence they may be used for or against him—6 P L J 241. The meaning of the expression 'may be taken into consideration' is not very clear, but it means at all events that the statements made by the accused persons are not to have the force of sworn evidence—20 A W N 169, and a conviction based on such a confession alone cannot be maintained—15 BOM 66

SUBSECTION (4) —No oath can be administered to an accused person and therefore he can not be examined as a witness. Thus where several accused are tried jointly, one accused cannot be sworn and therefore cannot be examined as a witness against his other co-accused till he is convicted or discharged—1 BOM 610, 2 ALL 260, 46 CAL 720, 10 BOM 190, 1906 P R 9, 1902 P B 12, U B B (1918) 4th Qr 115. But if they are tried separately, the prohibition would not apply, and one accused can be examined on oath as a witness against his co-accused—45 CAL 720, 23 BOM 213, 20 ALL 426, 1906 U B B (Evidence) 6. The reason is, that where the trial is separate, the accused in one case is examined in the other case not as an accused person but as a witness, and therefore he can be sworn, otherwise, no man while he stood charged with a criminal offence

could possibly be examined as a witness in any criminal trial whatsoever This is not the intent on of the Legislature—20 ALL 426

Where in a joint trial of several accused two of them pleaded guilty and were convicted but the Judge postponed their sentence and examined them on oath as witnesses against the other accused it was held by Candy J that as soon as they were convicted (though not sentenced) they ceased to be accused persons and could be examined on oath as witnesses but Fulton J held that the conviction did not put an end to their trial and therefore they were still accused persons and their examination on oath was illegal—3 BOM L R 437

The provision in subsection (4) that no oath can be administered to the accused has reference only to the statement made by him in answers to questions put to him by the Court under this section It has no reference to any other act of the accused, and therefore the accused can make an affidavit on oath in support of an application for transfer of the case under section 526—3 LAH 46

ACCUSED —The word "accused" in this section means a person over whom the Magistrate or other Court is exercising jurisdiction, therefore a person who has been discharged by the Police without being brought before a Magistrate is not an accused person and he can give evidence on oath in a trial of his accomplices—16 BOM 661, 4 L B R 362

The term "accused" means a person under trial, a person called upon to show cause under Section 133 is not an accused person within the meaning of this section and oath can be administered to him—2 C L J 149 So also, a person against whom the Public Prosecutor has withdrawn the case can be administered oath and examined as a witness—18 BOM L R 266

An informer is not an accused person and this section does not prevent oath being administered to him—1887 P R 38

343 Except as provided in sections 337 and 338, no No influence to be influence, by means of any promise or need to induce dis threat or otherwise shall be used to closures an accused person to induce him to disclose or withhold any matter within his knowledge

See Sec 21 of the Evidence Act Where the case against an accused was withdrawn and he was examined as a witness any inducement offered to such person should be deemed as offered to him as a witness and not as an accused and does not make his evidence inadmissible, though the credit to be attached to such witness is diminished—18 BOM L R 266

344 (1) If from the absence of a witness, or any other reasonable cause it becomes necessary

Power to postpone or adjourn proceedings or advisable to postpone the commencement of or adjourn any inquiry or trial, the Court may, if it thinks fit by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody

Remand Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time

(2) Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate

Explanation—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand this is a reasonable cause for a remand

SCOPE OF SECTION—This section relates to proceedings in inquiries or trials and has nothing to do with Police investigations and it contemplates a remand to jail not to Police custody—23 BOM 32

ADJOURNMENT—A Court of Justice has inherent jurisdiction to stay proceedings in a case pending before it and this section empowers a Criminal Court to adjourn an inquiry or trial for any reasonable cause—1916 P W R 4 Adjournments should not be made except upon strong and reasonable grounds. It is most inexpedient for a sessions trial to be adjourned. The trial before a Court of Session should proceed and be dealt with continuously from its inception to its finish. Occasions may arise when it is necessary to grant adjournments but such adjournments should be granted only on the strongest possible ground and for the shortest possible period—10 A L J 473 “The evidence of witnesses should invariably be recorded as soon as possible after their attendance. If from unavoidable causes an adjournment is indispensable there should be no unnecessary delay. Witnesses remaining over from day to-day should as a rule be examined at the first sitting of the Court on the following

day, and every effort should be made to minimise the inconvenience to which they may be put. After the examination of witnesses has commenced, the trial or preliminary inquiry should be proceeded with until all the witnesses in attendance have been examined, those for the prosecution being first examined, and if any witness be detained for a longer period than two days, the Magistrate should be careful to record the reason for each detention in the ordersheet of the case." —CAL G R & C O p 30 Where a trial is adjourned to a particular date, it is not competent for the Magistrate to accelerate the date of hearing against the wishes of the accused or his pleader. The trial should not be concluded and judgment pronounced without waiting till that date—1898 P R 14

It is discretionary with the Court to adjourn the inquiry or trial under this section. But this discretion is to be exercised only in cases which come really within the terms of this section. It should be exercised carefully and according to rule and not arbitrarily. If this power is used improperly and arbitrarily, the High Court will interfere under section 15 of the Charter Act—17 W R 55

The Magistrate should take some evidence before granting adjournment. On an application for adjournment by the prosecution on the ground that it would not be advisable to proceed with the case in the absence of an accused whose appearance had up to the date of the application not been secured, the Magistrate should before granting the application require the production of some evidence. But the omission to do this in a case in which the Magistrate had recorded some evidence before the issue of warrant would not by itself entitle the accused to claim to be discharged—19 CAL 182

The Court which adjourns the inquiry or trial and remands the accused is bound to record clearly the grounds of adjournment and remand—6 MAD 63

GROUND OF ADJOURNMENT —(1) The Magistrate may adjourn a trial for the purpose of allowing the accused to secure the attendance of his witnesses—16 W R 21, 11 W R 15 (2) The fact that the accused's advocate has gone to another place where he is detained in a lengthy criminal case is a reasonable ground for adjournment—1 BUR L T 213 (3) If the Sessions Judge is of opinion that the prosecution has not laid a basis for the reception of the depositions taken before the committing Magistrate in the absence of the accused, he should adjourn the trial under this section and under section 510 summon such witnesses as he may deem material—12 C L R 120 (4)

Where the counsel for the accused in a capital case applied for permission to cross-examine the witnesses on the day following as he was not prepared to cross-examine them that day, the Court should grant the application—11 CAL. 72. (5) If a witness not examined before the committing Magistrate is tendered as a witness for the prosecution and the accused objects on the ground that the examination of that witness will be a surprise to him, this may be a good ground for adjournment or postponement—1420 P. W. R. 1. (6) Where it is notified to the Court that an application is intended to be made to the High Court for transfer of the case, the Court is bound to give the party making the application a reasonable time for obtaining the order of the High Court and if necessary postpone the hearing—19 MAD. 375. (7) The perjury of an appeal against the conviction of the accused in a case is a good ground for adjourning the trial of the same accused in a subsequent case—C. M. L. T. 91. (8) The accused is entitled to have an adjournment of his case so as to enable him to secure the services of a pleader whom he wants to engage for the purpose of cross-examining the prosecution-witnesses—1916 P. W. R. 11.

WHAT ARE NOT GOOD GROUNDS FOR ADJOURNMENT —(1)

The Magistrate cannot postpone an inquiry for a reason not contemplated by this section, for instance his being busy with executive work—17 W. R. 65. (2) The fact that the accused wants time to engage an advocate and prepare his defence is not a sufficient cause for adjourning a trial in ordinary cases, though in complicated and difficult cases an adjournment may be granted on that ground—1 L. R. R. 270. But see 1916 P. W. R. 11 cited above. (3) Where the proceedings have been completed against a prisoner, the decision of the case should not be deferred on the ground that the principal offenders have not been apprehended—3 W. R. (Cr. Lct) 21. (4) Where a number of persons are accused of having committed an offence, the absence of some of them is not a reasonable cause for adjourning the inquiry into the guilt of the rest who have appeared before the Magistrate—1 L. R. R. 66. (5) The absence of a co-accused and the desirability of a joint trial are not sufficient reasons for the further postponement of proceedings—49 CAL. 182.

STAY OF CRIMINAL PROCEEDINGS PENDING CIVIL SUIT.

—There is no hard and fast rule that a criminal case should be stayed pending the disposal of a civil suit from which the criminal case has arisen or with which it is intimately connected—2 Weir 415; 1916 P. W. R. 8. The institution of a civil suit is not a valid ground for ad-

journing a criminal prosecution, although the issues and evidence in the two cases are practically the same—2 A L J 747 But each case should be dealt with according to its own particular circumstances, and to avoid a regrettable conflict of decisions between the Civil and Criminal Courts, the criminal proceedings should be stayed pending the decision of the civil suit—1916 P W R 8 If the object of prosecuting the criminal proceedings while a civil suit in relation to the same matter is pending be in reality to prejudice the trial of the civil suit or to coerce the accused into a compromise of the civil suit on terms to be practically dictated by the complainant the Magistrate should as a general rule postpone the criminal proceedings, till the disposal of the civil suit—2 Weir 415

The Magistrate has a discretion in such cases to adjourn or continue the criminal proceedings If the Magistrate on a consideration of all the circumstances exercises his discretion and either stays proceedings in the criminal case pending the disposal of the suit or declines to do so the High Court as a Court of Revision will not as a general rule interfere with the exercise of such discretion—2 Weir 115, 1 M H C R 66

* COSTS OF ADJOURNMENT —The words “on such terms as it thinks fit” empower Criminal Courts to allow the costs of an adjournment—1904 P R 20 33 M L J 366 2 P L W 218 This section clearly entitles a Court to award costs of adjournment to a party who have been put to unnecessary expenses by an adjournment on the application of the other party A judicious exercise of this power would have the effect of preventing many useless adjournments—28 ALL 207 Thus where the accused asks for an adjournment to which he is not entitled, the Court may make an order of adjournment conditionally on his paying the costs of the other side—9 C W N 18 33 M L J 366 But it is improper to direct the accused to pay the costs of adjournment when he applied under Section 596 for a transfer—1911 P W R 8

An order for costs will be made only in those cases where the circumstances are exceptional and where for some reason or another the ordinary everyday method of conducting criminal cases must be departed from—42 BOM 251 No order for costs should be made where the adjournment is inevitable and there is no other alternative Thus where the accused person being absent the Court cannot proceed with the case and is bound to adjourn the hearing it would be entirely opposed to the spirit of this section if the Magistrate under such circum-

stances passes orders awarding costs in addition to the order for the arrest of the accused by warrant—1906 P R 6

Similarly, where a case is adjourned owing to the absence of the complainant on the day fixed for hearing the Court has no power to order the accused to pay the costs of the adjournment 20 A L J 280

This Section does not apply to proceedings in appeal, and therefore an order requiring the appellant to pay the costs of an adjournment is improper and *ultra vires*—1919 P R 29

AGAINST WHOM COSTS MAY BE AWARDED—The costs are to be paid by the party applying for the adjournment, where a criminal case is taken up on a Police charge sheet filed on information given by a private person and such person engages a Vakil and moves the Court for an adjournment owing to the absence of the Vakil held that an order for costs can be validly made against that person on granting the adjournment prayed for even though he may not be a complainant under Section 200 since an informant is a person recognised in the Code as initiating criminal proceedings as much as a complainant acting under Sec 190—33 M L J 366 But where the prosecution is wholly conducted by the Police and the adjournment is asked for only for the convenience of the Police, the complainant cannot be ordered to bear the costs of the adjournment—24 BOM L R 380 If an adjournment takes place for which the complainant is solely to blame, then an order can be made that the complainant should pay any costs which may have been incurred by the accused for the adjournment—*Ibid*

REMAND—Remands to custody should not ordinarily be ordered under this section without first recording some evidence to show that good grounds exist for believing that the accused has committed a non bailable offence—11 A I R 162 if the offence is bailable the accused should be admitted to bail and not remanded to custody—8 C W N 779

When the accused is at first brought before a Magistrate and remand is desired it is not necessary to go fully into the charge, it is ordinarily sufficient to show by the evidence of a Police officer that they believe that the accused is concerned in the commission of an offence and on such proof the accused will be remanded to custody If the accused is again brought up after a remand and further remand is asked for some direct evidence of the guilt of the accused should be required to justify the Magistrate in ordering for further remand and with each remand the necessity for the production of evidence of guilt becomes more strong—6 MAD 69 36 CAL 174

(2) *The offences punishable under the sections of the Indian Penal Code specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that table*

Offence	Sections of Indian Penal Code applicable	Persons by whom offence may be compounded
Voluntarily causing hurt by dangerous weapons or means	324	The person to whom hurt is caused
Voluntarily causing grievous hurt	325	Ditto
Voluntarily causing grievous hurt on grave and sudden provocation	335	Ditto
Causing hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others	337	Ditto
Causing grievous hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others	338	Ditto
Wrongfully confining a person for three days or more	343	The person confined
Wrongfully confining a person in secret	346	Ditto
Assault or criminal force in attempting wrongfully to confine a person	357	The person assaulted or to whom the force was used
Dishonest misappropriation of property	403	The owner of the property misappropriated
Cheating	417	The person cheated
Cheating a person whose interest the offender was bound by law or by legal contract to protect	418	Ditto
Cheating by personation	419	Ditto
Cheating and dishonestly inducing delivery of property or the making alteration or destruction of a valuable security	420	The person cheated
Mischief by injury to work of irrigation by wrongfully diverting water when the only loss or damage caused is loss or damage to a private person	430	The person to whom the loss or damage is caused
House trespass to commit an offence (other than theft) punishable with imprisonment	451	The person in possession of the house trespassed upon
Causing a false trail or property mark	482	The person to whom loss or injury is caused by such use

Offence	Sections of Indian Penal Code applicable	Persons by whom offence may be compounded
Counterfeiting a trade or property mark used by another	483	The person whose trade or property mark is counterfeited
Knowing, selling or exposing or possessing for sale or for trade or manufacturing purpose goods marked with a counterfeit trade or property mark	486	Ditto
Marrying again during the lifetime of a husband or wife	494	The husband or wife of the person so marrying
Uttering words or sounds or making gestures or exhibiting any object intending to insult the modesty of a woman or intruding upon the privacy of a woman	509	The woman whom it is intended to insult or whose privacy is intruded upon

(3) When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner

(4) When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf may with the permission of the Court, compound such offence

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed or is the case may be before which the appeal is to be heard

(5A) A High Court acting in the exercise of its powers of revision under S. 439 may allow any person to compound any offence which he is competent to compound under this section

(6) The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded

(7) No offence shall be compounded except as provided by this section

CHANGE —In sub-section (1), the offence under section 508 I P Code has been added, in sub-section (2) the offences under Secs 343, 346, 357, 403, 417 418, 419, 420, 430, 451, 482, 483, 486, 494 and 509 I P Code have been added. Sub-section (5A) has been newly inserted and the italicised words in sub-sections (4) and (6) have also been added. The changes are of minor character and no reasons have been particularly stated in the Bill.

WITHDRAWAL AND COMPOSITION —A withdrawal (Sec 24^c) must be by intimation to the Magistrate holding the trial, whereas in many cases composition can be effected without permission of the Court. A withdrawal is permissible in a summons case whereas most of the compoundable cases are warrant cases. A withdrawal is the result of act of one party only, namely the complainant without the consent of the accused, whereas a composition presupposes an arrangement between both parties and implies a consent of the accused—21 CAL 103, 20 C W N 1209. Permission to withdraw can be given only to the complainant, whereas the right to compound an offence does not always belong to the complainant—14 MAD 371. On the withdrawal of a complaint the Magistrate can award compensation to the accused (1883 P R 24), but compensation cannot be awarded when a case is compounded—1883 P R 19.

A Magistrate has the option to permit the complainant to withdraw or not, but if the offence is compoundable without leave of Court, and a petition of compromise is put in, the Magistrate is bound to give effect to it. Whether a petition (e.g. a petition praying that the case be struck off the file) is one for withdrawal or compromise is to be judged from the fact whether the accused consented to it or not. Where it appeared that the accused had never consented to the compromise of the case, the petition was not a petition of compromise under this section, but one of withdrawal, and the Magistrate's refusal to permit withdrawal, and the subsequent proceedings resulting in the trial and conviction of the accused are not illegal—20 C W N 1209.

REQUISITES OF COMPOSITION —To constitute a valid composition, there must be some arrangement between the parties settling their difference—21 CAL 103, 1896 P R 9. Although a composition also signifies that the person against whom the offence has been committed has received some gratification (whether of a pecuniary character or otherwise) as an inducement for his desisting to abstain from a prosecution—21 CAL 103 still the passing of such

consideration or gratification is not absolutely necessary to effect a valid composition—186 P. R. 9 And it is not necessary that the consideration should be of a monetary character—39 MAD 916

To constitute a valid composition it must appear that the parties were free from influence of any kind and were fully aware of their respective rights—21 CAL 103

The composition may be effected in Court or out of Court The composition contemplated by this section is not limited to acts done in Court—39 MAD 916 The offences enumerated in subsection (1) can be compounded out of Court and in such cases if a composition is proved the Magistrate must give effect to it and cannot proceed with the trial—68 I. R. 281

WHEN OFFENCE CAN BE COMPOUNDED —Under this section a case may be compounded at any time before the sentence is pronounced therefore a petition for compromise filed by the parties when the judgment has actually been written should be accepted—15 CAL 816

Offence can be compounded even before complaint —An offence can be compounded even before a charge of the offence is laid in Court by the person injured An offence can be compounded apart from the question whether a charge or complaint has been laid before the Court or not and there is nothing in this section to suggest that a composition of an offence to be valid must be effected only after the accused is brought before the Court A composition made to prevent a case coming into Court is just as much a lawful composition under this section as one made after the case has come into Court There are certain offences, however (sub-section 2) which can be compounded only with the permission of the Court and the operation of the composition is necessarily suspended in those cases until the Court sanctions it—41 MAD 685

PROOF —Although the provisions of the Contract Act may not apply, the proof of the arrangement must be similar to that which the Court requires for the proof of any agreement which is in issue—21 CAL 103 The burden of proving that the offence has been validly compounded lies upon the accused—21 CAL 103

Proof as to factum of composition —Where one party to a compoundable criminal case alleges that the case had been compromised and the other resiles from the compromise and denies the same it is competent to the Court before which the case is pending to take evidence concerning the factum of the alleged compromise and

decide whether a compromise had in fact been arrived at or not—39 MAD 946, 41 MAD 685

THE OFFENCE MUST BE COMPOUNDABLE —Before allowing a composition, it is the duty of the Magistrate to find upon the evidence that a compoundable offence has been committed. If the evidence discloses a non-compoundable offence the Magistrate, upon a petition of compromise cannot treat the case as a compoundable one, and allow composition—Ratanlal 699, 4 BOM L R 718; 20 Cr L J 552 (Pat). So also the Magistrate has no jurisdiction to allow composition of a non-compoundable offence on the ground that it would be better for the complainant to compromise and that the accused also desires to compromise and it is probable that the case might in the end turn out to be a compoundable offence—1907 P W R 34

MAGISTRATE MUST ALLOW COMPOSITION —If the offence is compoundable without the permission of the Court, and a petition of compromise is put in the Court is bound to allow composition and has no option but to allow the offence to be compounded—4 A W N. 253. He is not at liberty to call upon the parties to adduce further evidence that the case has been compounded—16 BOM L R 939. It is his duty to accept the compromise and to dismiss the case and acquit the accused. He is wrong in ordering the petition to be put up on the record—3 C W N 322. A compromise can not be refused on the ground that the master in whose quarrel the servant (complainant) was injured refuses to give his permission—17 O C 92

If a charge is framed in respect of a compoundable offence and the proper person files a petition of compromise the Magistrate cannot alter the charge into one of a non-compoundable offence to prevent composition. He must give effect to the petition and acquit the accused—1914 P R 27. If the offence in respect of which the complaint was made is an offence compoundable without the leave of the Court and a petition of compromise is put in the Magistrate is bound to give effect to the petition and acquit the accused, even though by mistake he had mentioned a non-compoundable offence in the summons served upon the accused—2 P L T 692

If the offence is compoundable it may be compromised even though the case has been sent up by the Police—10 CAL 551

WHO CAN COMPOUND —The offence of hurt can be compounded only by the person to whom the hurt is caused—15 A L J 467. The widow of such person (that person dying in consequence of the hurt)

cannot compound—2 Weir 418, 37 ALL 419 Where hurt was caused to three persons, and one of them died subsequently, the remaining two can not compromise the offence as regards the deceased—31 ALL 606 In other words, where there are several complainant, one complainant can compound the offence committed against *himself* but not the offence committed against others—27 C W N 168

The offence of defamation can be compounded only by the person defamed, and not by another person aggrieved by the defamation Thus where a charge of defamation for imputing unchastity to a woman is instituted on the complaint of the husband the husband cannot compound the offence—2, BOW 151 In such a case the wife is the only person who can compound the offence and she can do so without the consent or even against the will of her husband But if the defamatory matter was published with the intention of injuring the reputation of both husband and wife and the husband instituted the complaint then no one except the husband could compound—14 MAD 371

An offence under section 498 I P C can be compounded only by the husband of the woman Though a complaint of that offence may be made by any person having the care of the woman during her husband's absence (section 199) still such person cannot compound the offence and an acquittal based upon such composition is illegal—4 LAL L J 18 21 C L J 120 (LAL)

A charge of criminal trespass can be compounded by the person who is in actual possession of the property trespassed upon and he (and not the juridical possessor) is the person who can bring the complaint in respect of the offence Otherwise we might have the juridical possessor (e.g. a trustee) prosecuting for criminal trespass and the actual possessor compounding the offence a result which could never have been contemplated by the Legislature—8 I B R 425

A minor cannot compound an offence—1921 P R 17 but under subsection (1) it can be compounded with the permission of the Court by the person competent to contract on behalf of the minor

PERMISSION OF COURT—In respect of the offences mentioned in subsection (1) no permission of the Court is necessary for compromise and no petition is therefore necessary to be presented to the Court for its sanction—9 MAD 432 except under circumstances mentioned in subsection (2)—3 A W N 215 4 A W N 167 In respect of offences referred to in subsection (2) the permission of the Court is absolutely necessary and such persons can be regarded as

by the Court and not by a Police officer. Granting permission to withdraw is a judicial act and can be exercised only by the Magistrate. A Police officer is not competent to entertain an application for the withdrawal of a complaint—Ratanlal 91

In cases falling under sub section (2) it is the duty of the Magistrate to decide whether he will or will not allow a compromise and the responsibility rests entirely with him. Unless the offence is so serious that punishment is absolutely necessary the Magistrate would well exercise his discretion in allowing a composition. Where the Magistrate refused to allow composition without sufficient reason the High Court in revision allowed the compromise—23 Cr L J 85 (LAL)

Under sub section (3) when an appeal is pending in respect of the offence, it is the Appellate Court alone which can allow the composition, the ruling in 2 ALL 339 (under the 1872 Code) which held that no offence could be compounded at the Appellate stage is no longer good law. When an appeal is pending the permission of the Appellate Court is necessary, even in respect of offences which are ordinarily compoundable without the sanction of the Court.

Permission by High Court in Revision —In 32 ALL 153 1901 P L R 252, 17 O C 92 it has been held that the High Court as a Court of Revision can exercise all the powers of an Appellate Court and can grant permission to compound an offence. But in 15 A L J 167 37 ALL 127 11 A L J 13 18 A L J 571 1918 P R 95 13 CAL 1113 3 P L T 158 18 C W N 1212 and 39 MAD 601 it is laid down that an offence cannot be allowed to be compounded when the case comes before the High Court in Revision when the High Court is sitting neither as a Court of Original Jurisdiction nor as a Court of Appeal. This latter view has now been rendered obsolete by the new subsection (5A) of this section which expressly gives the High Court the power to allow composition in Revision.

Composition on Retrial —When the accused was charged with and convicted of an offence compoundable without leave of Court and the conviction was reversed on appeal and retrial ordered and the complainant offered to compound the case it was held that no permission of the Court was necessary for the composition—3 A L J 523

RECORDING REASON —When allowing composition under sub section (2) the Magistrate should briefly record his reason for granting it so that if an appeal is preferred the Appellate Court may

be in a position to judge whether the discretion has been properly exercised—1 J. B. R. 319

PETITION OF COMPROMISE CANNOT BE WITHDRAWN —

When the parties have filed a petition of compromise, they cannot afterwards be allowed to withdraw the petition and to insist upon the case being tried—19 MAD 916, 3 C. W. N. 322, 33 C. L. J. 226

SUBSECTION (6)—*Acquittal*—When the petition of composition is put in, the Magistrate's sole remaining duty is to record a formal order of acquittal and set the accused person at liberty—1911 P. R. 29 The Magistrate is bound to acquit the accused if he acts illegally if he proceeds with the trial and convicts the accused—2 Weir 418 Any sentence that he may pass subsequently is illegal for the composition of an offence has the effect of an acquittal—4 A. W. N. 256

The High Court in revision can set aside an order of acquittal passed on a petition of compromise if there has been material irregularity—7 S. L. R. 200

Compensation—Compensation can be awarded under Section 250 only when the Magistrate himself acquits the accused after trial. But a composition of an offence has *in itself* the effect of acquittal and no trial is held and therefore no compensation can be awarded where the offence is compounded under this section—1888 P. R. 10 Ratanlal 937 Proceedings under Section 250 are inapplicable to a case where the accused person himself has by agreement with the prosecutor, arrived at a settlement and been a party to the compounding of the offence—10 BOM. L. R. 1056

EFFECT OF COMPOSITION—A composition has the effect of an acquittal and not of discharge and is therefore a complete bar to the prosecution of the accused for the same offence—6 S. L. R. 284, 1910 P. L. R. 22 The Magistrate cannot after composition institute proceedings against the accused under Section 437 (now 436)—4 A. W. N. 13 A composition has the effect of barring not only a prosecution for the same offence, but also for a cognate offence based on the same facts—Ratanlal 519, or for an offence involved in the former offence which has been compounded—17 C. W. N. 948 But the compounding of an original charge is not a conclusive answer to the charge made against the complainant under Section 211 I. P. C.—11 CAL. 79

Where there are several accused persons, the composition of an offence with one of them has not the effect of acquittal of *all* the accused persons but only of the particular accused with whom the com-

position took place—11 MAD 323, 45 BOM 346, 1 LAH 169, 19 A L J 374 This is now made clear by the words "with whom the offence has been compounded" newly added in subsection (6) In Calcutta and Patna cases where a compoundable offence was committed by a number of persons and the complainant compounded the offence with only one of them it was held that the effect of such composition was to compound the complaint not only in respect of the person with whom it was actually compounded but also in respect of the other persons, and the composition operated as an acquittal of all the accused—7 C W N 176 1 P L T 32 2 P L T 584 This view is no longer correct

The composition effected under this section would be a complete bar to a civil suit for damages—6 S L R 284

346. (1) If, in the course of an inquiry or a trial before a Magistrate in any district outside the presidency-towns, the evidence appears to him to warrant a presumption that the case is one which should be tried or committed for trial by some other Magistrate in such district he shall stay proceedings and submit the case, with a brief report explaining its nature, to any Magistrate to whom he is subordinate or to such other Magistrate, having jurisdiction, as the District Magistrate directs

(2) The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or refer it to any Magistrate subordinate to him having jurisdiction, or commit the accused for trial

WHEN MAGISTRATE SHOULD PROCEED UNDER THIS SECTION.—(1) The application of this section would be necessary if in the course of proceedings before a Magistrate it should transpire that the offence committed is apparently one which the particular Magistrate is not competent to try or one in which it appears that he is in some way personally interested (Sec 55) or which he is declared to be otherwise incompetent to deal with (Secs 152-157)—*Pointer*

(2) Proof of *prejudice* against a person named before a Magistrate will justify his taking action under this section—11 A W N 200

(3) When a Magistrate finds that he is *incompetent* to try a case he should not discharge the accused but should proceed under a section—2 Weir 323 If the offence is within his jurisdiction he

should proceed in the ordinary way and if it is a Sessions case, commit to the Sessions, he need not submit the case under this section to a superior Magistrate—7 C W N 157

(4) When the evidence discloses *circumstances of aggravation*, which make the offence one cognizable by a superior tribunal, it becomes the duty of the trying Magistrate to use the proper procedure for sending the case to the higher Court—13 BOM 502 No tribunal can properly elude jurisdiction by intentionally ignoring facts which make the offence really cognizable by a higher tribunal—2 Weir 121, 5 W R 65, 21 MAD 675 Thus where a theft is accompanied with violence it becomes a case of robbery which is beyond the jurisdiction of a second class Magistrate and such Magistrate cannot ignore the fact of violence and try the case as one of theft only—2 Weir 420

Similarly no Magistrate is entitled to cut down an offence from that which is established by the evidence in order to give himself summary jurisdiction—I C L R 134 29 CAL 409 11 CAL 216, 27 CAL 983 4 CAL 18

Framing of charge neither necessary nor illegal—It is not illegal for a Magistrate of the 2nd or 3rd class to frame a charge even though at the time of framing the charge he intended to submit the case to a superior Magistrate or to the District Magistrate—1905 U H H (Cr P C) 33 On the other hand if the inferior Magistrate sends the case to the superior Magistrate, without framing a charge, the superior Magistrate cannot send back the case to the inferior Magistrate, with direction to prepare a charge under a particular section—Ratanlal 499

POWER OF THE SUPERIOR MAGISTRATE—The superior Magistrate to whom the case is submitted may either try the case himself or refer it to any subordinate Magistrate or commit the accused for trial—45 MAD 816 Ratanlal 554 But he has no power to send the case back to the subordinate Magistrate—45 MAD 846 If he tries the case himself he must try it *de novo* he cannot convict the accused on evidence recorded by the Magistrate who submitted the case he must hear the evidence afresh Failure to do so vitiates the whole trial and the fact that the accused did not want the witnesses to be recalled and consented to rely upon the evidence of the submitting Magistrate does not cure the illegality—1905 P L R 91 5 P L W 40, 1905 P L R 106 17 L W 247 The special provisions of sec 350 do not apply where a case is submitted under this section by a subordinate Magistrate to a superior Magistrate—1905 P L R

91, 5 P L W 40 The law requires that the Judge by whom the case is to be tried should himself bear all the evidence of the witnesses and form an opinion of their credibility. Where a case partly heard by an inferior Magistrate was brought by a superior Magistrate to his own file who then recorded the rest of the evidence, and then passed a decision on the whole evidence, the conviction was held illegal—2 N W P H C R 168 If however the accused is not prejudiced by the evidence not being taken afresh, the High Court will refuse to set aside the conviction—14 A W N 200

But if the superior Magistrate to whom the case is submitted commits the case to the Sessions, instead of trying it, he need not take the evidence afresh, but can commit the case upon evidence recorded by the inferior Magistrate—12 C W N 136, Ratnial 472, 12 A L R 146

347. (1) If in any inquiry before a Magistrate or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall * * * commit the accused under the provisions hereinbefore contained

(2) If such Magistrate is not empowered to commit for trial he shall proceed under S 346

CHANGI —The words “stop further proceedings and” occurring in the old section between the words “shall” and “commit” have been omitted by the Criminal Procedure Code Amendment Act 1933 “This amendment is designed to bring Section 347 into line with Section 208” —*Statement of Objects and Reasons* (1933)

Under the old law there was a conflict of opinion as to the meaning of the words “stop further proceedings.” In Ratnial 977 15 Cr L J 701 (MAD) and 36 CAL 48 a very restricted meaning has been assigned to the words. The words have been interpreted to mean that as soon as the Magistrate considers that the case is one which ought to be tried by the Court of Session he should at once stop all proceedings and then and there commit the case to the Sessions even though neither the witnesses for the prosecution have been examined nor the defence witnesses have been examined. In other words, the power of a Magistrate to make commitment under this

section is not subject to the provisions of Chapter XVIII, and the Magistrate can commit even though all the evidence on either side has not been taken—Ratanlal 975

But a more reasonable construction has been given to the words in some other cases. Thus in a Burma case, the words 'stop further proceedings' have been interpreted to mean that the Magistrate should stop proceeding with the case *as a trial*, and instead commit the case to the Sessions, and in thus committing, he should adopt the procedure laid down in Chapter XVIII. These words do not enable the Magistrate to shorten the proceedings and then and there pass an order of commitment. The words "under the provisions hereinbefore contained" show that the Magistrate must make his proceedings conform to the provisions of Chapter XVIII and that before he writes and signs a committal order the provisions of that Chapter must be carried out and he must not conform to the mere passing of the committal order under section 213—6 L. B. R. 129. It was not intended by this section to enable the Magistrate to deprive the accused of any of the right conferred on him by Chapter XVIII—15 Cr. L. J. 366 (MAD), and an order of commitment made without taking all such evidence as the accused was prepared to produce before the Magistrate is invalid—26 ALL. 177 20 ALL. 261

This latter view will now prevail as a result of the present amendment which has deleted the above ambiguous words in order to remove this conflict of opinion.

PROCEDURE—It is not intended by this section that if the Magistrate finds that an order of commitment is to be made under this section, proceedings under Chapter XVIII are to be commenced *de novo*—15 Cr. L. J. 366 (MAD) 2 ALL. 910 therefore if the Magistrate has already completed the evidence of the complainant and his witnesses it is not necessary for him to take that evidence afresh. Only in respect of the remaining proceedings the provisions of Chapter XVIII should be followed—2 ALL. 910

"OUGHT TO BE TRIED"—See notes under section 207 for the meaning of these words.

If in a case some of the accused persons are charged with an offence which ought to be tried by the Court of Session and the case against the other accused is a summons case which the Magistrate can try and adequately punish it is not illegal for the Magistrate to commit *all* the accused to the Sessions—21 Cr. L. J. 791 (Sind)

BEFORE SIGNING JUDGMENT —The commitment can be made if the judgment has not been given or signed. After signing judgment no Court other than a High Court shall alter or review the same except as provided in sections 369, 395 and 484—1 B H C R 3, 7 B H C R 67, 5 W R 61, 6 W R 70, 17 W R 2, 23 W R 49, 11 CAL 42, 2 ALL 33, 7 ALL 672.

Commitment may be made after framing a charge—3 CAL 495.

✓ **348.** (1) Whoever having been convicted of an offence punishable under Chapter VII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards is again accused of any offence punishable under either of those Chapters with imprisonment for a term of three years or upwards, shall if the Magistrate before whom the case is pending is satisfied that there are sufficient grounds for committing the accused be committed to the Court of Session or High Court as the case may be, unless the Magistrate is competent to try the case and is of opinion that he can himself pass an adequate sentence if the accused is convicted.

Provided that, if any Magistrate in the district has been invested with powers under section 30 the case may be transferred to him instead of being committed to the Court of Session.

(2) When any person is committed to the Court of Session or High Court under sub-section (1) any other person accused jointly with him in the same inquiry or trial shall be similarly committed, unless the Magistrate discharges such other person under section 209.

CHANGE —The underlined words have been added by Sec 92 of the Criminal Procedure Code Amendment Act 1931.

If the Magistrate is competent to try the case — The amendment has been made on the line of section 209 (1) — *Report of the Select Committee of 1931*.

The Select Committee of 1931 — We have introduced this amendment to make it clear that the section does not empower the Magistrate to pass sentence in a case which he is not competent to try. — *Report of the Select Committee of 1931*.

In the proviso the words "any Magistrate in the district" have been substituted for the words "the District Magistrate" occurring in the old section. The amendment is merely verbal.

SUBSECTION (2) — This clause provides that when any person is committed to the Court of Session under Sec 348 any other person accused jointly whom the Magistrate believes to be guilty shall be similarly committed. Identical treatment will thus be accorded to all the accused — *Statement of Objects and Reasons* (1914).

SECTIONS 348 AND 349 — If the accused is an old offender the Magistrate should act under this section and not refer the case to a superior Magistrate under section 349—2 Weir 423. That section does not apply to a case where the accused is an old offender—4 L. B. R. 252. If a Magistrate instead of proceeding under this section erroneously sends up a case under section 349 it is open to the District Magistrate to take the case on his own file or to transfer it to some other first-class Magistrate—2 Weir 422.

PROCEDURE — The Magistrate must first of all determine, either as a preliminary matter or at any rate before framing a charge, whether there has been a previous conviction. If previous conviction is proved the Magistrate will then have to consider whether in the circumstances of the case his powers enable him to try and pass adequate sentence. If he thinks they do not permit he should not try but commit the case to the Sessions (but he should not discharge the accused) if they do permit he may try it himself. If he commits the case to the Sessions he ought not to find the accused guilty but should merely frame a charge under section 210 and commit the case for trial under Chapter XVIII—38 MAD 552.

COMMITMENT NOT IMPERATIVE — The words "unless convicted" did not exist in the Code of 1882 or the earlier Codes and therefore it was imperative on the Magistrate to commit if previous conviction was proved and he could not try the case himself—Ratanlal 704. But the 1898 Code gives a discretion to the Magistrate to try the case himself if he is competent to pass adequate sentence—2 Weir 422. Ratanlal 70.

POWERS OF DISTRICT MAGISTRATE — Under the proviso to this section if the District Magistrate is invested with powers under sec 30 the case may be transferred to him instead of being committed to the Sessions. In such a case the District Magistrate need not try the case *de novo*. He can under section 350 act on the evidence

already recorded by the Magistrate who transferred the case See notes under sub section (3) of section 350

If the District Magistrate considers that the case should be committed to the Sessions, he should himself commit, and not send back the case to the subordinate Magistrate with a direction to commit—
9 MAD 377

If the District Magistrate commits the case instead of trying it he can, it seems, act upon the evidence recorded by the subordinate Magistrate, and need not commence with the inquiry *de novo* See Bataulal 472 and 12 C W N 136 cited under sec 346

349. (1) Whenever a Magistrate of the second or third class, having jurisdiction, is of opinion after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from or more severe than, that which such Magistrate is empowered to inflict, or that he ought to be required to execute a bond under section 106, he may record the opinion and submit his proceedings, and forward the accused, to the District Magistrate or Sub-divisional Magistrate to whom he is subordinate

(1-A) When more accused than one are being tried together and the Magistrate considers it necessary to proceed under sub-section (1) in regard to any of such accused, he shall forward all the accused who are in his opinion guilty to the District Magistrate or Sub-divisional Magistrate

(2) The Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law

Provided that he shall not inflict a punishment more severe than he is empowered to inflict under Sections 32 and 33

CHANGE —Sub-section (1A) has been added by the Criminal Procedure Code Amendment Act 1923 This is similar to sub-section (2) of section 348

APPLICATION OF SECTION —The provisions of this section are subject to the express provisions of sec 348 Therefore where the

and is an inferior Magistrate should commit him to the Sessions under sec. 348 and not submit the case to the superior Magistrate under this section—2 Weir 423 4 L. B. R. 2-2

The procedure prescribed by this section is unsuited to cases tried summarily—4 L. B. R. 277

REFERENCE TO SUPERIOR MAGISTRATE—If a case referred—Only the second or third class Magistrate can refer. A first class Magistrate is not competent to submit the case under this section—7 ALL 414

This section does not authorise any Bench of Magistrates to refer a case for higher punishment—4 L. B. R. 277

Reference discretionary—Whether a case ought to be referred to the superior Magistrate or not is within the discretion of the subordinate Magistrate and the District Magistrate cannot direct the subordinate Magistrate to send up the case under this section. If he so directs his order is ultra vires—2 Weir 427

To what case can be referred—The case can be referred to the District Magistrate or the Magistrate to whom the referring Magistrate is subordinate and to no other Magistrate—38 BOM 719

WHEN REFERENCE CAN BE MADE—This section authorises a reference to the superior Magistrate when the subordinate Magistrate considers that the accused should receive a severer sentence than he himself is competent to inflict. If the punishment which the subordinate Magistrate proposed was one which he himself could inflict the reference was improper and the Magistrate should himself try the case—1 A. W. N. 99. When a case was sent to the District Magistrate not because the referring Magistrate was not competent to pass a severe sentence but on the ground that it was advisable that the matter should be dealt with by the District Magistrate it was held that the transfer was neither under sec. 349 nor under sec. 192 and therefore the conviction made by the District Magistrate was illegal and must be set aside—12 ALL 66

The subordinate Magistrate can also refer the case if he is of opinion that the accused ought to be required to execute a bond under sec. 106

POWERS AND DUTIES OF REFERRING MAGISTRATE—If the subordinate Magistrate sends the case to the higher Magistrate for severer punishment he cannot convict the accused, the conviction and sentence are reserved for the higher Magistrate. The referring Magistrate is required to state his opinion only, but he cannot convict—

—2 Weir 428, but this is no longer good law in view of the fact that section 350 as now amended does not apply to transfer of proceedings under section 349. See subsection (2) of section 350.

350. (1) Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial partly recorded by one Magistrate and partly by another ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial.

Provided as follows —

(a) in any trial the accused may when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard.

(b) the High Court or, in cases tried by Magistrates subordinate to the District Magistrate, the District Magistrate may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was held if such Court or District Magistrate is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial.

(2) Nothing in this section applies to cases in which proceedings have been stayed under S. 346 or in which proceedings have been submitted to a superior Magistrate under section 349.

✓ (3) When a case is transferred under the provisions of this Code from one Magistrate to another the former shall be deemed to cease to exercise jurisdiction therein and to be succeeded by the latter within the meaning of subsection (1).

CHANGE —The italicised words have been added by section 94 of the Criminal Procedure Code Amendment Act 1923. The reasons are stated below.

PRINCIPLE —The general principle is that a case must be decided by the Magistrate who heard the evidence—1919 U. B. R. 4th

Qr 118 19 Cr L J 657 (NAG) But if this principle has to be strictly observed it follows that in every case of transfer, the succeeding Magistrate will have to try from the beginning all cases which have been partly heard by his predecessors in office and there will be endless delay in trials And this section is obviously intended to meet such cases—20 CAL 870, 19 Cr L J 657 (NAG) In view of the frequent changes in the office of Magistrates the Code provides specially that a Magistrate may pronounce judgment on evidence recorded by his predecessor, or partly recorded by his predecessor and partly by himself—3 MAD 112

APPLICATION OF SECTION —(1) This section applies to an inquiry under section 107 with a view to taking security to keep the peace therefore where a Magistrate holding inquiry under section 107 is transferred after the examination of some prosecution witnesses and is succeeded by another the person called upon to shew cause why he should not give security may insist upon the re-summoning and re-examination of those witnesses—4 C L R 152 The person proceeded against under section 107 is in the position of an accused person and he has the right under section 130 proviso (a) to have the witnesses recalled and re-summoned—43 MAD 510

(2) This section is applicable to proceedings under section 115 Where in the course of such proceedings one Magistrate is transferred the succeeding Magistrate can act upon the evidence already recorded—13 C W N 420 37 CAL 812 Contra—23 W R 62

(3) This section applies to inquiries preliminary to commitments The succeeding Magistrate can commit the case to the Sessions on evidence recorded by his predecessor in-office—31 MAD 40 36 ALL 315

(4) This section would enable a Magistrate to try a case in which his predecessor has issued a process and granted adjournment but has recorded no evidence—Ratanlal 622

(a) This section does not apply to cases tried by Benches of Magistrates—23 CAL 194 18 MAD 394 20 CAL 870 2 LAH 237, 22 Cr L J 511 see these cases cited under section 15 Even the new section 350A does not apply where one Magistrate of a Bench is replaced by another that section contemplates cases wherein all the Magistrates constituting the Bench have heard the proceedings throughout See notes under that section

(6) This section applies only to Magistrates but not to Sessions Judges A Sessions Judge is not competent to pronounce judgment

on evidence recorded by his predecessor or on evidence partly recorded by his predecessor and partly by himself—21 W R 47, 1864 W R 32, 8 C L J 59, 3 MAD 112 7 C P L R 1, 35 ALL 63 Even the consent of the accused would not enable the Sessions Judge to do so and validate such procedure—26 BOM 50 23 W R 59 1890 P R 1

(7) This section refers to cases where one Magistrate is succeeded by another Magistrate and does not apply where the Magistrate remains the same and his official designation is merely changed Thus where a Head Assistant Magistrate having almost completed the trial of a criminal case was appointed to the office of a Deputy Magistrate in another place in the same District and the case was brought on to his file to the latter place by order of the District Magistrate he could proceed to try the case from the point at which he had arrived as Head Asst Magistrate prior to his transfer to the post of Deputy Magistrate and the accused cannot demand under this section that the trial must be commenced *de novo*—22 MAD 47

(8) This section does not apply where the District Magistrate holds further inquiry into a case under section 437 (now 436) In such a case he must hold the inquiry *de novo* and cannot rely on the evidence recorded by the Magistrate who previously tried the case—6 ALL 367 7 BIR L R 198

“(SUCCESSION) —A liberal construction should be put upon the provisions of section 350 Where on the death of a Magistrate empowered under section 90 the District Magistrate being the only remaining Magistrate in the District having powers under that section took upon his file a case which was commenced by the deceased it was held that the District Magistrate must be regarded as having succeeded the deceased Magistrate within the meaning of this section—10 Cr L J

beyond the stage of trial, and cannot transform the trial proceedings into an inquiry by cancellation of the charge—38 MAD 585. And since the succeeding Magistrate cannot cancel the charge, the order subsequently passed letting off the accused is one of acquittal and not of discharge—2 L. W. 1214, 38 MAD. 585.

If a trial is commenced *de novo* by the succeeding Magistrate, he must observe all the procedure of the trial, and cannot omit any part of the procedure. Where in a *de novo* trial, the Magistrate omitted to examine the prosecution witnesses (who had already been examined by the preceding Magistrate) but allowed them to be cross-examined by the defence, it was held that the trial was not in due compliance with this section and ought to be set aside—12 C. W. N. 138. Similarly when the Magistrate holding the *de novo* trial merely read over to the accused the deposition of the prosecution witnesses (recorded by the preceding Magistrate) though he allowed them to be cross-examined, the procedure was held to be illegal—9 L. B. R. 92, 1919 P. W. R. 16, 22 Cr. L. J. 119 (CALC.).

RETRANSFER OF MAGISTRATE TO HIS ORIGINAL PLACE

—Before the conclusion of the trial the trying Magistrate was transferred. Thereupon the case was transferred to the file of a superior Magistrate who began to try it *de novo*. Afterwards the original Magistrate was retransferred to his original place, and the superior Magistrate transferred the case to him with a direction to proceed from where he had originally left it. It was held that the inferior Magistrate must try the case *de novo*, and cannot proceed from where he had originally left the case, because all that had taken place before the inferior Magistrate originally had been superseded—20 Cr. L. J. 638 (PAT.), 3 ALL. 563.

PROVISO (a)—Right of Accused—Under proviso (a) the accused has a right to demand that the witnesses or any of them shall be re-summoned or reheard. The policy of the law is that an accused should be able to claim a right not to be convicted by a Magistrate who has not himself heard the whole evidence—3 LAH. 115. The accused can exercise his right under the proviso (a) in case of a trial only, where a preliminary inquiry before commitment is transferred before frame of charge, the accused is not of right entitled to a trial *de novo*—32 Mad. 218, 1903 P. R. 14. Proceedings in a warrant case before a charge is framed are merely an inquiry and not a trial, and at that stage a Magistrate is not bound to adopt the procedure laid down in this proviso—32 M. L. T. 81. This proviso does not apply to an inquiry under

section 145, consequently, a Magistrate has power to proceed with the inquiry of a case under sec 145, where a portion of the evidence has been recorded by his predecessors, and he is not bound to start proceedings *de novo* on the application of the accused—37 C L J 128

The proper time for the accused to ask for the re-summoning and re-hearing of the witnesses according to this proviso is as soon as the trial commences before the second Magistrate and not when the charge is framed—3 Lah 115, and the trial commences only when the accused appears. Before he enters appearance the accused is not bound to make any application (through a pleader) for the re-summoning and re-hearing of witnesses—25 CAL 861. Moreover the accused person must himself claim or waive the right. Where a case was transferred from one Magistrate to another, and during the arguments on the transfer application the pleader for the accused stated his intention not to have a *de novo* trial in the Court to which the case was transferred, and subsequently the accused demanded a trial *de novo*, it was held that there was no waiver of the right under this section and that there must be a *de novo* trial—19 Cr L J 657 (Nag)

If the accused exercises his right of re-summoning the witnesses for the prosecution and they retract their former statements made before the preceding Magistrate those former statements cannot be treated as evidence in the case—1 Lah 115

The Magistrate is not bound to ascertain from the accused whether he wishes to exercise the right conferred by this proviso. This section confers the right on the accused to demand and does not prescribe that the Magistrate shall ask the accused whether he will exercise the right or not—U B R (1912) 151. The Magistrate is not bound to have the accused brought before him to ascertain whether he wishes to exercise this right—1881 P R 6. An omission on the part of the Magistrate to ask the accused whether he wants evidence to be re-heard is a mere irregularity, cured by sec 537. In (1916) U B R 2nd Qr 108 and 2 L B R 287, however it has been held that it is necessary for the Magistrate to acquaint the accused with the fact that he is entitled to have the witnesses recalled and re-examined. Though the law does not absolutely require this to be done this procedure should be followed as a matter of practice—2 L B R 287.

But if the accused wants the evidence to be reheard the Magistrate must recommence the trial—9 L B R 92 and the refusal by the Magistrate to do so would be an illegality incurable by sec 537—1911 P R 3 25 CAL 693

PROVISO (b) —A District Magistrate can under proviso (b) set aside a conviction passed by a first class Magistrate in the District, though no appeal lies from his order to the District Magistrate—9 Bom 100, 12 CAL 173, 7 ALL 853, 8 MAD 18

SUBSECTION (2) —The procedure laid down in this section does not apply to proceedings stayed under sec 346—1905 P L R 91 Thus where a Magistrate trying a case was of opinion that the accused deserved a severer punishment than he could inflict, and stayed the proceedings and submitted the case to the District Magistrate under sec 346 it was held that the District Magistrate could not convict the accused on the evidence recorded by the referring Magistrate even though the accused did not want the evidence to be reheard—1903 P R 25 5 P I W 40 In such a case the accused has no power to waive their right to a trial *de novo* and the failure to hold a trial *de novo* is an illegality which vitiates the whole trial and is not merely an irregularity covered by sec 537—5 P L W 40

This subsection is now amended further lays down that the procedure of the section does not apply to sec 349 Prior to this amendment it was held that the superior Magistrate to whom a case had been transferred under section 349 could act upon the evidence already recorded by the subordinate Magistrate—2 Weir 428 This ruling is no longer correct Under the present amendment, the superior Magistrate must hold the trial *de novo*

It appears that there was a heated discussion among the members of the Joint Committee as regards the amendment of this subsection, the non official members being in favour of the amendment and the official members opposing it ' Our colleague Sir B C Mitter pointed out that in regard to sections 346 and 350 the general principle is recognised that a Court which convicts an accused should ordinarily act upon evidence heard by itself and suggested the advisability of applying the same principle to cases coming under section 349 The official members of the Joint Committee were of opinion that a distinction should be drawn in the case of section 349 inasmuch as under that section a Magistrate who is competent to try the offence has heard the whole of the prosecution evidence and has formed his opinion thereon whereas under section 346 a Magistrate who finds that he had not jurisdiction only heard part of the evidence The official members also thought that if the provisions of section 350 were to be applied to cases under section 349 the latter would probably become inoperative as Magistrates would prefer to dispose of cases

themselves and pass what in their opinion was an inadequate sentence rather than run the risk of having the cases re heard. The non official members were of opinion that in those circumstances section 349 might be repealed. The Committee, however, as a whole agreed that they would not be justified in making such a drastic alteration in the Code until the point had been specifically put to Local Governments and their opinions had been invited. Clause 92 has, therefore, in this respect been left unaltered"—*Report of the Joint Committee (1922)*

✓ **SUBSECTION (3)—Transfer of proceedings**—Subsection (1) applies where the Magistrate is transferred from one place to another, the case remaining in the same Court. But does that subsection apply where a case is transferred from one Magistrate to another under section 528, the Magistrates remaining in the same post? In other words, does that subsection apply to transfer of cases as well, or is it confined only to transfer of Magistrates only? There was some difference of opinion under the old section as to this question. In the following cases it has been held that this section covers cases where proceedings are transferred by section 528 from the Court of one Magistrate to that of another because as soon as a case is transferred from one Magistrate to another the former 'ceases to exercise jurisdiction' in the case within the meaning of this section—35 CAL 457, 39 CAL 781, 32 MAD 218, 1016 U B R 2nd Qr 109, 21 C W N 755, 10 ALL 307, 20 Cr L J 41 (NAG), 12 BUR L T 55, 1 P L T 679.

The contrary view has been held in the following cases—9 A W N 130, 12 C W N 140, 1 L B R 301, 12 ALL 16, 14 ALL 316, 1 N L R 187.

To remove this conflict of opinion subsection (3) has been added adopting the former view. "There has been some difference of opinion as to the position when cases are transferred from one Magistrate to another otherwise than from a predecessor to a successor in office. The amendment provides that the Magistrate from whom the case is transferred shall be deemed to cease to have jurisdiction within the meaning of this section"—*Statement of Objects and Reasons (1914)*

350A. *No order or judgment of a Bench of Magistrates shall be invalid by reason only of a*

Changes in constitution of Bench *change having occurred in the constitution of the Bench in any case in which the Bench by which such order or judgment is passed is duly*

constituted under Ss. 15 and 16, and the Magistrates constituting the same have been present on the Bench throughout the proceedings.

This section has been added by Sec 95 of the Criminal Procedure Code Amendment Act, 1923

In the Bill of 1921, it was intended to add the following sub-section to section 350.—

“(4) The provisions of this section shall apply, so far as may be, to proceedings before any Bench of Magistrates constituted under section 15 wherever the Magistrates sitting together in any proceeding are not the same as those who were sitting together at the last hearing thereof ”

In other words it was intended to lay down that if during the hearing of a trial, any magistrate of the Bench is absent and is replaced by another, such a change would not affect the proceeding and the trial need not be commenced *de novo* the new coming Magistrate will act on the evidence already recorded. But this clause did not meet with the approval of the Joint Committee who observed “We think, however, that the new sub-section (4) which has been introduced in the Bill to deal with the case of Benches goes somewhat too far, and we have substituted for it a new section after section 350 which in our opinion gives effect to the law as laid down by the High Courts. Briefly, it provides that a judgment of a Bench shall be valid when the Bench is duly constituted at the time of passing the judgment, and the judgment is passed by Magistrates *all of whom have heard the proceedings throughout* ” *Report of the Joint Committee (1922)*

For cases, see notes under section 15

351. (1) Any person attending a Criminal Court, although not under arrest or upon a summons may be detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned

(2) When the detention takes place in the course of an inquiry under Chapter XVIII or after a trial has been begun, the proceedings in respect of such person shall be commenced afresh, and the witnesses reheard.

This section applies even though a trial has actually been begun. In 14 W. R. 20, it was held that this section cannot be applied where the trial is actually being proceeded with, because such a course deprives the prisoner of the opportunity of preparing his defence and subjects him to be tried on evidence which was taken before he was put into the position of a prisoner. This ruling is no longer good law, because subsection (2) provides for the difficulty presented in that ruling and requires the proceedings to be commenced afresh.

This is a self-contained section and the cognisance which a Magistrate takes under this section in respect of an offence is independent of the provisions of Sec. 190 (c). Consequently the provisions of section 191 are also inapplicable where a Magistrate takes cognisance under this section—5 N. L. R. 113.

As to taking cognisance against a witness in a case, see notes under section 190 (c).

352. The place in which any Criminal Court is held for the purpose of inquiring into or trying Courts to be open any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them.

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to or be or remain in, the room or building used by the Court.

COURT TO BE OPEN —Jail trial.—This section does not necessarily make a trial in a jail invalid where there is nothing to show that admittance was refused to any one who desired to communicate with their friends or counsel. But it is undesirable to hold trial in a jail, because it is difficult to get counsel to appear in jail—1917 P. W. R. 21.

The evidence of a Ghosha woman should be taken behind a pindah at a private place where she can come in the presence of the accused only, the Judge taking such precautions as he can to secure her identity—2 Weir 132.

EXCLUSION OF POLICE OFFICERS.—A police officer who has investigated into a case should not be allowed to be present before a Magistrate when he records a confession made by the accused—5 A. W. N. 221.

CHAPTER XXV

OF THE MODE OF TAKING AND RECORDING EVIDENCE IN
INQUIRIES AND TRIALS

353. Except as otherwise expressly provided, all evidence taken under Chapters XVIII, XX, XXI, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader

"ALL EVIDENCE. —This section lays down that all evidence shall be taken in the presence of the accused and it includes both the evidence for the prosecution as well as for the defence. Where, after all the prosecution witnesses were examined the accused absconded and the witnesses named by him were examined in his absence and he was convicted the conviction was held to be illegal — **C B R (1912) 4th Qr 132**

"IN THE PRESENCE OF THE ACCUSED —If the witnesses are not examined in the presence of the accused the trial is invalid and the conviction will be set aside—**2 A W P H C R 49** Where a *pardanashin* lady was examined in a passage screened from direct view of the Court and her voice could be perfectly heard in the Court and by the accused and he made no objection it was held that this evidence was virtually heard in the presence of the accused—**1887 P R 41** But *pardanashin* ladies should not be generally summoned to appear in Court to give evidence but may be examined on commission—**4 CAL 20 12 ALL 69** Contra—**5 ALL 92**

Where the evidence of witnesses taken in the absence of the prisoner at a former trial was read out to them and put in as evidence at the present trial it was held that the proceeding was irregular and prejudicial to the prisoner and that such witnesses should have been subjected to a fresh oral examination in the presence of the accused—**12 W R 3** See also **9 ALL 609 Ratn Lal 24 1 Bur S R 399**

The Magistrate should not only take the evidence in the presence of the accused but his record must show on the face of it that he has done so. The Magistrate should by the use of a few apt words on the face of the deposit on make it apparent that he had taken the evidence in the presence of the accused—**10 ALL 174**

When his personal attendance is dispensed with —See Sec 205
The presence of an accused person may be dispensed with on ground

of his ill-health—14 BOM. L. R. 236 A respectable *pardanashin* woman should not ordinarily be compelled to appear in person in the first instance unless and until there is strong likelihood of the charge being proved—1909 P. W. R. 5, and where her presence is dispensed with, the evidence may be recorded in the presence of her pleader—1908 P. W. R. 20, 45 MAD 339

354. In inquiries and trials (other than summary trials) under this Code by or before a Magistrate (other than a Presidency Magistrate) or Sessions Judge, the evidence of the witnesses shall be recorded in the following manner.

Manner of recording evidence outside presidency towns.

355. (1) In summons-cases tried before a Magistrate other than a Presidency Magistrate, and in cases of the offences mentioned in subsection (1) of S. 260, clauses (b) to (m), both inclusive, when tried by a Magistrate of the first or second class and in all proceedings under S. 514 (if not in the course of a trial), the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds.

(2) Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record.

(3) If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same, and such memorandum shall form part of the record.

In summons-cases, the deposition may be recorded in the form of a memorandum, but it is not necessary that the recorded deposition should be read over to the accused and omission to do so cannot be regarded as a fatal defect—2 Weir 433

In cases other than those mentioned in this section the evidence cannot be recorded in the form of a mere memorandum, if it is so recorded, the conviction will be set aside—2 Weir 432

In cases referred to in section 260 if they are tried summarily the substance of the evidence must be embodied in the judgment as well as the particulars mentioned in section 264. If those cases are

tried regularly, instead of summarily, this section prescribes a briefer record, 3 L. B. R. 3

In proceedings under Chapter XXXVI (maintenance proceedings) evidence ought not to be recorded as in summary trials but in the manner provided by this section—20 CAL. 351

There is no provision as to the language in which the memorandum is to be recorded. But there is also no provision which renders it illegal for a Native Second Class Magistrate to record the memorandum in English. Such a procedure is a mere irregularity which does not vitiate the trial unless a failure of justice has been occasioned thereby—19 MAD. 262

Under Subsection (2) the Magistrate must sign the record if he omits to do so the illegality vitiates the trial—3 P. L. T. 322

356. (1) In all other trial before Courts of Session and Magistrates (other than Presidency Magistrates) and in all inquiries under Chapters XII and XVIII, the evidence of each witness shall be taken down in writing in the language of the Court by the Magistrate or Sessions Judge, or in his presence and hearing and under his personal direction and superintendence and shall be signed by the Magistrate or Sessions Judge

(2) When the evidence of such witness is given in English the Magistrate or Sessions Judge may take it down in that language with his own hand and unless the accused is familiar with English, or the language of the Court is English, an authenticated translation of such evidence in the language of the Court shall form part of the record

(24) *When the evidence of such witness is given in any other language, not being English, than the language of the Court, the Magistrate or Sessions Judge may take it down in that language with his own hand, or cause it to be taken down in that language in his presence and hearing and under his personal direction and superintendence, and an authenticated translation of such evidence in the language of the Court or in English shall form part of the record*

(3) In cases in which the evidence is not taken down in writing by the Magistrate or Sessions

Memorandum when evidence not taken down by the Magistrate or Judge himself Judge, he shall, as the examination of each witness proceeds, make a memorandum of the substance of what such witness deposes, and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall form part of the record.

(4) If the Magistrate or Sessions Judge is prevented from making a memorandum as above required he shall record the reason of his inability to make it.

CHANGE —Subsection (2A) has been added by section 96 of the Criminal Procedure Code Amendment Act 1923. The reason is thus stated: "Section 356 does not provide for evidence being taken down in any other language than that of the Court or if the language of the Court is not English, in English. The result is a certain loss of accuracy whenever evidence is given in a third language as it has to be translated into, and taken down in, the language of the Court or in English. The object of the amendment is to secure greater accuracy and to avoid waste of time in translation"—*Statement of Objects and Reasons* (1921).

RECORD OF EVIDENCE —The provisions of this section are imperative, and omission to record the evidence in the mode prescribed by this section is a material irregularity sufficient to set aside the proceedings, 20 W. R. 14, 19 Cr. L. J. 235 (Pat.), 11 A. W. N. 115. Where a Magistrate in hearing the evidence of the complainant and his witnesses made no vernacular record of the evidence, the procedure was held to be illegal—10 A. W. N. 164, 17 A. L. J. 1116.

The provisions of subsection (1) are imperative and the entire evidence must be recorded fully either by the Magistrate himself or by somebody else under the direction of the Magistrate. In the latter case (i.e., where the evidence is recorded by any person other than a Magistrate), the Magistrate should under subsection (3) make a memorandum of the evidence. But subsection (3) does not override the provision of subsection (1) but is merely supplementary to it. In other words the fact that the Magistrate is making a memorandum of the evidence does not do away with the necessity of the evidence being fully recorded by some other officer of the Court. Where a Magistrate in a proceeding under section 115 neither recorded the evidence fully in his own hand, nor caused it to be recorded fully by

any body else, but simply made a memorandum of the evidence, purporting to act under subsection (3), it was held that the provisions of subsection (1) not being complied with, the whole proceedings of the Magistrate must be set aside—42 CAL 381

357. (1) The Local Government may direct that in any Language of record district or part of a district, or in proceedings before any Court of Session, or before any Magistrate or class of Magistrates the evidence of each witness shall, in the cases referred to in S 356, be taken down by the Sessions Judge or Magistrate with his own hand and in his mother-tongue, unless he is prevented by any sufficient reason from taking down the evidence of any witness, in which case he shall record the reason of his inability to do so and shall cause the evidence to be taken down in writing from his dictation in open Court

(2) The evidence so taken down shall be signed by the Sessions Judge or Magistrate, and shall form part of the record

Provided that the Local Government may direct the Sessions Judge or Magistrate to take down the evidence in the English language, or in the language of the Court, although such language is not his mother tongue

The authority conferred on an officer by this section is personal to that officer and remains in force only so long as he remains in the particular district in which it has been conferred—5 M H C R App 9 Therefore, where a Magistrate empowered to record deposition in his own hand while in District B did the same when he was transferred to another District, under the belief that the authority previously given to him still remained in force and committed the accused for trial, it was held that the Magistrate's proceeding was irregular, but since the accused was not prejudiced thereby, his commitment was not set aside—2 Weir 434

The plea of the accused need not be recorded in the words of the very language in which it is made when it is a foreign language, the record must be in the language in which it is interpreted to the Court—5 CAL 826

358. In cases of the kind mentioned in S 355, the Option to Magistrate Magistrate may, if he thinks fit, take in cases under S 355 down the evidence of any witness in the manner provided in S 356, or, if within the Local limits of

the jurisdiction of such Magistrate the Local Government has made the order referred to in S 357, in the manner provided in the same section.

Mode of recording evidence under S 356 or S 357. **359.** (1) Evidence taken under S 356 or S 357 shall not ordinarily be taken down in the form of question and answer but in the form of a narrative.

(2) The Magistrate or Sessions Judge may in his discretion, take down or cause to be taken down, any particular question and answer.

The ordinary and proper and convenient way of recording evidence is to take it down in the first person exactly as spoken by the witness—16 W. R. 36.

The Judge should in taking down evidence adhere as far as possible to the words actually used either in the question or in the answer given by the witness. The provisions of law will not be complied with by recording a more or less accurate paraphrase of the evidence given by a witness—11 BUR. L. R. 8.

The Judge is not bound to make a verbatim record of any particular question and answers. It is left to the discretion of the Judge if either side specially request him to do so—11 BUR. L. R. 8.

360. (1) As the evidence of each witness taken under S 356 or S 357 is completed it shall be read over to him in the presence of the accused if in attendance or of his pleader if he appears by pleader, and shall if necessary be corrected.

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him the Magistrate or Sessions Judge may instead of correcting the evidence make a memorandum thereon of the objection made to it by the witness and shall add such remarks as he thinks necessary.

(3) If the evidence is taken down in a language different from that in which it has been given and the witness does not understand the language in which it is taken down the evidence so taken down shall be interpreted to him in the language in which it was given or in a language which he understands.

SCOPE OF SECTION —This section applies to evidence recorded under sections 356 or 357 but not to evidence recorded under section 355. Where the evidence is recorded in the form of a memorandum, under section 355 it is not incumbent on the Magistrate to read over the memorandum of the deposition to the witness—4 P L W 44, 19 Cr L J 169, and omission to do so is not fatal to the conviction—2 Weir 433. When a case is tried summarily, it is not necessary that the evidence of witnesses should be read over to them—23 Cr L J, 120 (Pat.)

This section applies to the evidence of witnesses and not to the examination of the accused—12 W R 44.

This section applies to proceedings under section 145, the term "accused" being applicable to persons proceeded against under Chapter VII—3 P L T 291.

OBJECT OF SECTION —The object of this section is to give an opportunity to the witnesses to explain or correct the statements made by them—4 P L W 44, 19 Cr L J 169. This section as enacted for the protection of witnesses, it provides that a witness in order to satisfy himself that the evidence which has been taken down is correct may have it interpreted to him, if he desires it, in a language which he understands—7 C L R 393.

DEPOSITION MUST BE READ OVER TO WITNESS —If the deposition is recorded in a language which the witness does not understand, it must be interpreted to the witness in the language which he understands. If the deposition is read over to the witness in a language which is neither understood by the accused nor his witness, it is an illegality which materially prejudices the accused—8 W R, 63. But if the witnesses did not require their deposition to be interpreted to them in their own language the reading over the depositions to them in a language which they did not understand does not afford any ground for the accused to have his conviction set aside—7 C L R 393.

The provisions of this section are obligatory and not merely directory. It is incumbent on the Judge to read over the deposition to each witness even though such a procedure should occupy considerable time—42 CAL 95, 76 CAL 955. Any departure from such a practice might lead to considerable embarrassment and place a serious impediment in the administration of justice—35 CAL 95. It is not a sufficient compliance with this section for a Magistrate merely to

hand over the recorded deposition to the witness to read it for himself, because the section requires that the deposition must be read over in the presence, i.e., in the hearing of the accused, in order that the accused should have an opportunity of correcting any mistake in it—42 CAL 240

This section lays down that the evidence of each witness shall be read over to him *as it is completed*, and this procedure should be strictly followed. It is not a sufficient compliance with this section to read out each sentence of the statement of a witness as it is being recorded—22 Cr L J 669 (Lah)

The deposition must be read over to the witness, *in the presence of the accused*. A conviction based upon evidence not read over in the presence of the accused is illegal and must be set aside—2 Weir 135. It is improper to have the deposition of the witness read over to him by a clerk in the verandah of the Court-house, though both the witness and the clerk were in view of the accused. Such a deposition cannot be admitted in evidence—U B R (1912) 1st Qr 123. The deposition of a witness may be read over in the presence of a pleader of one of several accused—36 CAL 808.

There is nothing in the section to indicate the exact time when the deposition should be read over, and if the deposition is read over at the close of the cross examination, it fulfils the requirements and objects of the section—4 P L W 11, 19 Cr L J 169. But while the evidence of one witness is being read over to the accused, it is highly irregular to proceed with the evidence of the next witness—2 Weir 135.

When a deposition is not read over to a witness in the presence of the accused according to the provisions of Sub-section (1), the witness cannot be prosecuted for perjury—6 CAL 762, 36 CAL 955, 12 C W N 815, 2 P L T 380, 11 BUR L T 202, 28 MAD 708, 12 CAL 210. *Contra*—12 BUR L T 167, where it is held that a witness can be prosecuted for perjury in spite of the fact that his deposition has not been read over to him in the presence of the accused, the deposition should not be treated as a nullity merely because of the irregularity, it can be proved by other evidence, e.g., by evidence that the witness admitted it to be correct when it was read over to him, and the evidence of the Judge or Magistrate who recorded it. So also it has been held in 5 M L T 117 and 21 M L J 111 that evidence not read over to the witness in the presence of the accused

may not be used as evidence against the accused but may be the basis of a prosecution of the witness for perjury

DEPOSITION MAY BE CORRECTED—Before a deposition is closed, a witness should be given an opportunity of explaining and correcting any contradictions which it may contain, and the statement which the witness finally declares to be the true one must be taken to be that which he intended to make—Ratanul 51 An honest witness who wishes to alter or correct a statement he has once made, should be allowed to do so and should not be deterred from doing so by the fear of a criminal charge—10 CAL 937

If the Court instead of allowing the correction to be made proceeds to make a memorandum according to sub section (2) such memorandum must be appended to the deposition and care should be taken that the practice and the form prescribed by law are exactly adhered to—13 W R 17

361. (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him

Interpretation of evidence to accused or his pleader

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language

(3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary

This Section relates to the oral evidence of witnesses as to documentary evidence though an accused has a right to have all or any part of the document used in his trial translated or interpreted to him yet it is not necessary to interpret formal documents such as Government Gazettes at length that would be merely wasting time It would be enough if the prisoner were made to understand what they were and for what purpose they were used—15 W R 25

If the accused appears by a pleader who understood the language in which the evidence was given by the witness the omission to interpret the evidence to the accused is not a material defect—24 W R 50

362. (1) In every case in which a Presidency Magistrate imposes a fine exceeding two hundred rupees or imprisonment for a

Record of evidence in Presidency Magistrate's Courts

term exceeding six months he shall either take down the evidence of the witnesses with his own hand or cause it to be taken down in writing from his dictation in open Court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record.

(2) Evidence so taken down shall ordinarily be recorded in the form of a narrative but the Magistrate may in his discretion take down or cause to be taken down any particular question or answer.

(2A) In every case referred to in sub-section (1) the Magistrate shall make a memorandum of the substance of the examination of the accused. Such memorandum shall be signed by the Magistrate with his own hand and shall form part of the record.

(3) Sentences passed under S. 33 on the same occasion shall for the purposes of this section be considered as one sentence unless they are sentences of imprisonment ordered to run concurrently.

(4) In cases other than those specified in sub-S. (1) it shall not be necessary for a Presidency Magistrate to record the evidence or frame a charge.

CHANGE.—Sub-section (1) has been amended as shown in parallel columns. The italics in sub-section (3) have been inserted and sub-sections (2A) and (2B) have been inserted by the Criminal Procedure Code Amendment Act of 1908. The changes are stated below.

362. (1) In every case tried by a Presidency Magistrate in which an appeal lies such Magistrate shall either

Record of evidence in Presidency Magistrate's Courts

take down the evidence of the witnesses with his own hand or cause it to be taken down in writing from his dictation in open Court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record.

SCOPE.—*Summary trials.*—The provisions as to summary trials do not apply to trials before Presidency Magistrates. A warrant case must be tried by them in the manner laid down in Chapter XVI, subject to the provisions of this section as to the recording of evidence.—*Ratanlal 339*

Reference under Sec. 123 (2).—In cases where the Presidency Magistrate makes a reference to the High Court under Sec. 123 (2), he must duly record the evidence, but it is not necessary that he should record it as fully as a Mofussil Magistrate.—*13 C. W. N. 318*

SUBSECTION (1).—We think that the opening words of sub-section (1) of section 362 require amendment. As the section stands, it seems to imply that a Presidency Magistrate before he commences his inquiry must make up his mind as to the maximum limit of the sentence which he will impose. We think that the sub-section would read better as amended by us compare the wording of section 261.—*Rep. of the Select Committee of 1901*

But even this amendment does not improve the position because in order to ascertain whether an appeal will lie from his sentence the Presidency Magistrate will have to make up his mind whether he will pass a sentence of over six months imprisonment or a fine exceeding two hundred rupees (Sec. 111). The Joint Committee in confirming the above amendment has also admitted it.—

We are inclined to agree with those critics who point out that the re-draft proposed in sub-section (1) of section 362 does not get rid of the difficulty that a Magistrate has to make up his mind as to the sentence he will impose before he begins trying the case. We do not see how this difficulty can be got rid of but we think that the amendment proposed has the advantage of bringing the language of this section into conformity with the language of sections 263 and 261 and we would therefore retain this sub-clause.

* In order to meet difficulties that have arisen we have introduced a sub-section (2 A) laying down that Presidency Magistrates in cases subject to appeal shall make a memorandum of the substance of the examination of the accused and we have introduced a new clause making a consequential amendment in sub-section (4) of section 364.

The non official members who constituted a majority in the Committee, expressed their dissatisfaction with the distinctions drawn in the Code between Presidency Magistrates and other Magistrates, and in particular with regard to this clause would have liked to see Presidency Magistrates required, in warrant cases at all events, to

362. (1) In every case in which a Presidency Magistrate imposes a fine exceeding two hundred rupees or imprisonment for a term exceeding six months he shall either take down the evidence of the witness with his own hand, or cause it to be taken down in writing from his dictation in open Court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record.

(2) Evidence so taken down shall ordinarily be recorded in the form of a narrative but the Magistrate may, in his discretion, take down, or cause to be taken down any particular question or answer.

(2A) *In every case referred to in sub-section (1) the Magistrate shall make a memorandum of the substance of the examination of the accused. Such memorandum shall be signed by the Magistrate with his own hand and shall form part of the record.*

(3) Sentences passed under S. 35 on the same occasion shall, for the purposes of this section, be considered as one sentence unless they are sentences of imprisonment ordered to run concurrently.

(4) *In cases other than those specified in sub-S. (1), it shall not be necessary for a Presidency Magistrate to record the evidence or frame a charge.*

CHANGE —Sub-section (1) has been amended as shown in parallel columns, the italicised words in sub-section (3) have been inserted, and sub-sections (2A) and (4) have been newly added by the Criminal Procedure Code Amendment Act of 1923. The reasons are stated below.

362. (1) In every case tried by a Presidency Magistrate in which an appeal lies such Magistrate shall either take down the evidence of the witnesses with his own hand or cause it to be taken down in writing from his dictation in open Court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record.

SCOPE —Summary trials —The provisions as to summary trials do not apply to trials before Presidency Magistrates. A warrant case must be tried by them in the manner laid down in Chapter XXI, subject to the provisions of this section as to the recording of evidence—Ratanlal 539

Reference under Sec 123 (2) —In cases where the Presidency Magistrate makes a reference to the High Court under Sec 123 (2), he must duly record the evidence, but it is not necessary that he should record it as fully as a Mofussil Magistrate—13 C W N 318

SUB SECTION (1) —“We think that the opening words of sub section (1) of section 362 require amendment. As the section stands, it seems to imply that a Presidency Magistrate before he commences his inquiry must make up his mind as to the maximum limit of the sentence which he will impose. We think that the sub section would read better as amended by us compare the wording of section 264’ —*Report of the Select Committee of 1916*

But even this amendment does not improve the position, because in order to ascertain whether an appeal will lie from his sentence the Presidency Magistrate will have to make up his mind whether he will pass a sentence of over six months’ imprisonment or a fine exceeding two hundred rupees (Sec 411). The Joint Committee in confirming the above amendment has also admitted it —

We are inclined to agree with those critics who point out that the re draft proposed in sub section (1) of section 362 does not get rid of the difficulty that a Magistrate has to make up his mind as to the sentence he will impose before he begins trying the case. We do not see how this difficulty can be got rid of but we think that the amendment proposed has the advantage of bringing the language of this section into conformity with the language of sections 263 and 261, and we would therefore retain this sub clause

In order to meet difficulties that have arisen we have introduced a sub-section (2 A) laying down that Presidency Magistrates in cases subject to appeal shall make a memorandum of the substance of the examination of the accused and we have introduced a new clause making a consequential amendment in sub-section (4) of section 361

“The non-official members who constituted a majority in the Committee expressed their dissatisfaction with the distinctions drawn in the Code between Presidency Magistrates and other Magistrates and in particular with regard to this clause would have liked to see Presidency Magistrates required, in warrant cases at all events, to

keep as full a record as any other Magistrate. But the Committee as a whole held that there was some force in the contention put forward by numerous High Court Judges that no change should be made in the Code affecting to any extent the special powers of Presidency Magistrates until a much fuller inquiry had been made into the question of their status powers and procedure. We desire to take this opportunity of placing on record our hope that it may be possible to appoint a small committee to undertake this investigation"—*Report of the Joint Committee (1922)*

SUB SECTION (2) —Mode of recording evidence—Evidence should be recorded in the form of direct narration. Where a Presidency Magistrate in contravention of the provisions of this section recorded the evidence of some more or less formal witnesses in the form of an *indirect* narration, it was held that such irregularities in the mode of recording evidence, where no failure of justice has been occasioned thereby were cured by sec 537, and the trial was not on that account vitiated—18 Cr L J 336 (MAD)

It is the duty of the Magistrate in recording evidence under this section, to take a note of all the material facts whether they appear in the course of the examination in chief or in the course of the cross examination—46 CAL 411

SUB SECTION (3) —“Unless concurrently”—“It is provided that when sentences in excess of one are passed which are ordered to run concurrently, it is the heaviest sentence which determines the applicability of section 362”—*Statement of Objects and Reasons (1914)*

SUB SECTION (4) —“It is intended by this subsection to remove the uncertainty which at present exists regarding the duties of a Presidency Magistrate in recording evidence and framing a charge in petty cases”—*Statement of Objects and Reasons (1914)*

Sub section (1) provides that the evidence must be fully recorded in cases where the Presidency Magistrate passes appealable sentences, and there is no obligation on the Magistrate to record evidence in non-appealable cases—31 CAL 983, 33 CAL 1036. In a Bombay case it has been held that although the Magistrate has a discretion in cases not falling under this section to take down the evidence or not, still the discretion should be exercised judicially in a reasonable spirit and not arbitrarily and there should be record of the evidence, so that the High Court in Revision may judge of the propriety or legality of the order passed by him—10 BOM L R 201. The new sub-section (1)

now totally dispenses with the necessity of recording evidence in non appealable cases

363. When a Sessions Judge or Magistrate has recorded the evidence of a witness he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination

Remarks respecting demeanour of witness

The object of this section is to give to the Appellate Court some aid in estimating the value of the evidence recorded by the Magistrate—12 W R 51 Though in criminal cases the Appellate Court should be guided by the remarks made under this section as to the demeanour of witnesses yet it is bound to independently consider the facts of the case—1898 P R 6 But where a Sessions Judge of experience had in the most emphatic manner stated that the demeanour of the witnesses was evasive that they inspired him with no confidence and that no man could be convicted on their testimony the Appellate Court before accepting their testimony must be assured in the most positive and convincing manner that there was no ground for the Sessions Judge's criticism—1914 P W R 27

It is always unsafe for a Judge or a Magistrate to pronounce an opinion as to the credibility of a witness until the whole of the evidence has been taken—2 Weir 430

364. (1) Whenever the accused is examined by any Magistrate or by any Court other than a High Court established by Royal Charter or the Chief Court of Lower Burma, the whole of such examination including every question put to him and every answer given by him, shall be recorded in full in the language in which he is examined or, if that is not practicable in the language of the Court or in English and such record shall be shown or read to him or if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands and he shall be at liberty to explain or add to his answers

Examination of accused how recorded

(2) When the whole is made conformable to what he declares is the truth the record shall be signed by the accused and the Magistrate or Judge of such Court and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing and that

the record contains a full and true account of the statement made by the accused

(3) In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound, unless he is a Presidency Magistrate, as the examination proceeds, to make a memorandum thereof in the language of the Court, or in English, if he is sufficiently acquainted with the latter language, and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

(4) Nothing in this section shall be deemed to apply to the examination of an accused person under Section 263, or Section 362 *sub-section (2A)*

CHANGE —The italicised words at the end of sub-section (4) have been added by section 98 of the Criminal Procedure Code Amendment Act, 1923. This amendment is merely consequent on the addition of sub-section (2A) to section 362.

This amendment has been made in deference to the opinion of Shah J. in 46 BOM 441 (at pp 447—448) in which his Lordship remarked that the provisions of section 364 should be relaxed so far as Presidency Magistrates are concerned.

SCOPE AND APPLICATION OF SECTION —The examination of an accused person under this section is subject to the purpose referred to in sec 342, viz to enable the accused to explain any circumstances appearing in the evidence against him, but not to fasten the guilt on him—10 MAD 295. The rules laid down in this section are applicable to the examination of the accused under sec 342 of the Code—1 BOM L R 461, 1 BUR L R 320.

This section applies only to inquiries and trials. It does not apply to investigations which are governed by sec 161—10 B H C R 166. But still the rules laid down in this section are equally applicable to confessions taken under sec 164 in the course of an investigation—1 BOM 219, 3 A W N 213.

This section applies to the record of statement made by an accused. A person against whom no process has been issued is not in the position of an accused person, and if such person is examined in an enquiry under sec 202 his statement cannot be regarded as having been recorded under this section—32 CAL 1085.

This section does not apply where there has been *no examination* of the accused. The examination of an accused is in the discretion of the Magistrate prior to commitment. If the Magistrate does not examine the accused, or if the accused is unwilling to submit to an examination, it is sufficient for the Magistrate to make a note of the fact and record it as a reason for not examining the accused—11 S. L. R. 52

RECORD OF QUESTION AND ANSWER —Every question and every answer must be recorded ~~as before, no matter whether statement~~

[To page 776.]

In section 364,

(a) in subsection (3) the words "unless he is a Presidency Magistrate" shall be omitted; and

(b) in subsection (4) for the words "or section 362 subsection (2A)" the following shall be substituted, namely:—

"Or in the course of a trial held by a Presidency Magistrate."

This amendment has been made by the Criminal Procedure Code Second Amendment Act, XXXVII of 1923. For the Statement of Objects and Reasons, see the page after the "Preface" of this book, headed "Some Recent Amendments."

As to the *substance and meaning* of the prisoner's statement "the omission will not make the statement inadmissible in evidence—12 C. L. R. 120, 8 CAL. 618 (foot-note)

Record need not be in Magistrate's handwriting —There is nothing in this Code which necessitates a Magistrate to take down the examination of the accused in his own hand. It is enough if he appends a certificate that the examination was conducted in his presence and contains accurately all that was said by the accused—20 W. R. 50

LANGUAGE —The law requires that ordinarily the statement of the accused must be recorded in the language in which it was made the object being to represent the very words and expressions

used so as to ensure accuracy and prevent misrepresentation and misconstruction of what was said—21 CAL 642, 2 N W P H C R 16 This rule of law ought not to be deviated from unless it is shown that it was impracticable to write the statement in the language in which it was made If the answers are not taken down in the language in which they were given the irregularity cannot be cured by sec 533—15 CAL 595, 10 O C 122 Where the accused was examined by the Magistrate in *Marathi* and gave his answers in *Marathi* the statement should be recorded in *Marathi* It is illegal to record them in English—Ratanlal 633, 21 BOM 495 If however it is not practicable to record the statement in the language in which it was made, the law directs that the statement shall be recorded in the language of the Court or in English—21 CAL 642 Thus where the confession of the accused person made in Bengali was recorded by the Magistrate in English because he could not write Bengali well and there was no mohurrer with him at the time it was held that there was no illegality—22 CAL 817 Where a confession made in Hindustani was recorded by a Muhammadan Magistrate in Bengali the language of the Court the High Court held that it cannot be presumed that the Magistrate must have sufficient acquaintance with Urdu so as to record the statement in that language and that in the absence of any evidence it should be presumed that the Magistrate found it impracticable to record the statement in Urdu—18 CAL 549 In 1899 P R 7 16 C P L R 122 O S C 277 although it was practicable for the Magistrate to record the statement in the language in which it was made still an English record was held to be good, if no prejudice was caused to the accused the irregularity being cured by sec 533

If the confession of the accused is made in a foreign language unknown to the Court or Magistrate the Code does not require that it should be recorded in that language In such a case the record of the confession should be in the language in which it was conveyed to the Court by the interpreter—5 CAL 826

Where a statement was made by the accused in Manipuri and communicated to the Magistrate by an interpreter in Bengali and the Magistrate recorded it in English and there was also a record in Manipuri but the two records differed it was held that the record in Manipuri should be regarded as the proper record and the only evidence in the case—21 CAL 642

'RECORD TO BE SHEWN TO ACCUSED' ETC —Before a statement can be admitted in evidence, it is necessary to see that such statement has been deliberately made and recorded, and that after being recorded, it has been *shown or read over* to the accused so that he might be assured that his words have been correctly taken down—7 W R 49 Merely recording in the order sheet or judgment that the statement or examination of the accused was put in and read out to him is not a compliance with the requirements of the section—6 P L J 147 This section requires that the record shall be shown or read over to the accused and if he does not understand the language in which it is written it must be interpreted in a language which he understands Where a Magistrate showed or read a confession recorded in English to the accused who did not understand English, the provisions of this section were not complied with—4 N W P H C R 16

SUB-SECTION (2)—*Record must be signed* —The record of confession must be signed by the accused A record which does not bear the signature of the accused is not admissible in evidence until the defect is cured in the manner provided by sec 533—3 A W N 243 23 BOM 221 Where the signature or mark of the accused was not taken to the record of the statement made by him to a Magistrate the defect can be cured by examining the Magistrate as a witness to prove that the statement recorded was duly made—16 A W N 161, 11 B H C R 237 Where the signature of the accused was not taken by the committing Magistrate and no objection was raised before the Sessions Court by his pleader on the ground of absence of signature and no prejudice was caused to the accused it was held that under the circumstances of the case the irregularity was not a sufficient ground for reversing the judgment—11 B H C R 237 The record must be signed by the accused himself in his own hand writing, it cannot be signed by another person for the accused If so signed it is inadmissible in evidence—11 B H C R 44, but now see section 533

If the accused is unable to write his mark is a sufficient compliance with the requirements of this section—2 Weir 437 But if he can write, his thumb impression is not sufficient—32 CAL 550

The signature of the accused must be taken in the presence of the Magistrate To take it in an adjoining room in the presence of a clerk and not in the immediate presence of the Magistrate is

DELIVERY OF JUDGMENT—The delivery of judgment and the passing of sentence is an integral part of the criminal trial. It is not a mere formality, and a deliberate breach of this express provision of law is not a mere irregularity curable by Section 537—1 BUR L J 122. A judgment which is not delivered is no judgment. Where a Judge after writing his judgment but before delivering it, dies or leaves the Bench, his written judgment cannot be considered as a judgment, but it is merely an opinion—13 W R (Civil) 209. A judgment though written and signed, is inoperative until it is pronounced, and must be merely taken as an expression of opinion—11 A L J 745.

The judgment must be delivered in open Court—21 CAL 121. Where the Judge by reason of his illness could not attend Court, and pronounced judgment at his private residence, the procedure was not quashed as no prejudice was caused to the accused—1 AGRA H C R 17.

The judgment must be pronounced by the Judge or Magistrate who held the trial. The duty of signing and delivering the judgment cannot be delegated by the presiding officer to another person. Where a Senior Judge after holding trial in one district went away to another district and sent his judgment to the Magistrate of the former District to be delivered, and the District Magistrate delivered it, the trial was set aside—9 A W N 181. Contra—18 M L J 197, where the delivery of the judgment by the successor of the Magistrate who wrote it was held not illegal.

The judgment must be pronounced in the presence of the accused. Where the accused having absconded, the Magistrate passed sentence in his absence, and upon his re-arrest pronounced the judgment again, it was held that the Magistrate should not have pronounced his previous judgment in the absence of the accused—Ratanlal 325 1917 P R 36. If, however the judgment is one of acquittal or of fine only, it may be passed in the absence of the accused, under s. 317 (2)—6 S L R 206.

The judgment in a criminal case must be passed without delay, as delay is not only unjust to the accused as it prevents him from appealing at once, but is opposed to the principles of justice. P L R 21. In a trial by jury it is not necessary, under Section 233, to record a judgment but only the heads of charges to be recorded, and these should be written out by the judge. When the charge to the jury has been actually delivered, it is not necessary to record it.

the case are fresh in the minds of the Judge—36 CAL 281 In this case the charge to the jury was written 3 weeks after, and the High Court severely remarked upon the delay

It is not necessary that the whole of the judgment should be read It is sufficient if the substance of the judgment is delivered Omission to read a portion in the judgment is a mere irregularity covered by Section 537—2 WEIR 711, 38 MAD 498

PASSING SENTENCE BEFORE JUDGMENT—Judgment must always be written and delivered before sentence is passed It is illegal to pronounce a sentence at the termination of the trial and to postpone the writing of the judgment to a future occasion—*Punjab Circ* p 239 In as much as the sentence in a case of conviction and the direction to set the accused at liberty in the case of acquittal can only follow on the decision and cannot precede it and in as much as the decision must be contained in the written judgment it must necessarily follow that the sentence is illegal if there is no written judgment when it is passed—14 ALL 242 Where the judgment was delivered after the order of acquittal was passed, the acquittal was set aside and a re-trial ordered—12 A W N 157 Where the judgment was written and delivered some days after the prisoners were convicted and sentenced, it was held that this was a violation of the express provisions of this section and was more than a mere irregularity; and the conviction and sentence must be set aside—27 MAD 237

In some cases however, it has been held that such an irregularity does not vitiate the whole proceedings unless there has been a failure of justice, such irregularity will be cured by Section 537—23 CAL 502, 5 S L R 131 13 BOM L R 645 21 CAL 121 38 MAD 498, 45 MAD 913 (F B) See subsection (4)

Where a Magistrate died after pronouncing sentence but before writing judgment, the High Court reversed the conviction and sentence and ordered a retrial—1 BOM L R 160 But in 2 WEIR 433 it has been held that a conviction on a trial regularly held will not be set aside merely because the Magistrate had been unavoidably prevented from recording a judgment

LOSS OF JUDGMENT—This section only imposes the condition that the judgment must be pronounced in open Court and imposes a few other conditions but such conditions do not include the condition that the record should not have been lost even in cases where the judgment has been lost the appropriate course was set Judge is to rewrite

the judgment from memory and from the materials on record and place it on record—38 MAD 498

367. (1) Every such judgment shall, except as otherwise expressly provided by this Code be written by the presiding officer of the Court or from the dictation of such presiding officer in the language of the Court, or in English and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it, and where it is not written by the presiding officer with his own hand every page of such judgment shall be signed by him

(2) It shall specify the offence (if any) of which, and the section of the Indian Penal Code or other law under which the accused is convicted, and the punishment to which he is sentenced

(3) When the conviction is under the Indian Penal Code and it is doubtful under which of two puts of the same section of that Code the offence falls, the Court shall distinctly express the same and pass judgment in the alternative

(4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty

(5) If the accused is convicted of an offence punishable with death and the Court sentences him to any punishment other than death the Court shall in its judgment state the reason why sentence of death was not passed

Provided that in trials by jury the Court need not write a judgment but the Court of Session shall record the head of the charge to the jury

(6) For the purposes of this section, an order under S 118 or S 123 sub-section (3) shall be deemed to be a judgment

CHANGE —The italicised words in subsection (1) and the new subsection (6) have been added to Section 100 of the Criminal Procedure Code Amendment Act, 1941

Under the old Section it has been held that the judgment must be written by the Magistrate himself he cannot get it written by a clerk—Ratanlal 512 and that if the judgment is written

at the dictation of the Magistrate and the Magistrate signs it the procedure is illegal—4 C L J 181 The present Amendment will now allow such procedure

JANGLAKH.—Under this section the judgment of a Criminal Court should be written in the language of the Court or in English. Where an Honorary Magistrate wrote his judgment in Urdu instead of Hindi the language of the Court it was held to be irregular, but such irregularity was cured by Section 337—4 C L J 232

CONTENTS OF JUDGMENT.—The judgment must be self-contained and nothing should be left out. If any material finding is left out in the judgment the defect cannot be cured by the Magistrate's subsequent explanation to the Appellate Court—7 C L J 238. A judgment should contain sufficient particulars to enable a Court of Appeal to know what facts were found and how—Ratanlal 833. The judgment should show that the Court had considered the evidence and had found in a case of conviction that the facts proved to the satisfaction of the Court brought an offence home to the accused person whom the Court convicted—19 ALL 406. Where a judgment, though not a long and elaborate one affords a clear indication that the Court duly considered the evidence it is a good judgment—1 C W N 169. But if the judgment is so meagre that it is impossible to form an opinion as to the merits of the case or to say whether there has been a carriage of justice or not the judgment must be set aside—5 C L J 40.

Where an Appellate Court finds that the Magistrate has not written a judgment in conformity with the provisions of Section 367, the correct procedure is to accept the appeal and to remand the case for hearing *de novo*. The Appellate Court cannot retain the appeal on its file and ask for a judgment which the Magistrate has failed to record—(1920) M W N 120.

Points for determination.—Every judgment of a Criminal Court must contain a clear statement of the points for determination—BOM H C Cr Cir p 38. The attention of all Criminal Courts is invited to this necessity of very strictly observing the provisions of the latter portions of clause (1) of section 367, which declares that the judgment must contain the points for determination the decision thereon and the reasons for the decision—Col 6. It is to be noted that where the Sessions Judge convicted the accused with out stating the facts of the case or the points for determination and the reasons thereon and the accused was convicted the judgment was set aside—C W N

Sentence—Under this section, the sentence is a part of the judgment and when an accused person is convicted it is incumbent upon the Court to pass a formal sentence of even a single day's imprisonment or any other punishment to make the record legally complete—4 A W N 218 In estimating the sentence to be passed, the defence put forward by the accused should not be treated as a matter of aggravation—3 A W N 170

As to the legality of passing sentence before judgment, see notes under sec 366

SIGNING—The signature should be made with a pen and not with a stamp There are obvious reasons why judicial documents should be authenticated in such a manner that their authenticity may admit of proof But the affixing of a signature with a stamp would be no more than a mere irregularity—6 MAD 396 But mere initialling is not signing—O S C 192

The signature of the Magistrate must be appended to the judgment at the time of pronouncing it in open Court—Ratanlal 429, 40 MAD 108

The dating and signing of the judgment must be done by the presiding officer of the Court, it can not be delegated to any body else—9 A W N 181 Where a Magistrate who has tried a case and written out the judgment is succeeded by another before he has actually pronounced the same, it is not obligatory on the succeeding Magistrate to pronounce the same, and much less can he be compelled to do so, though he may, if he chooses, date, sign and pronounce it in which case he will be adopting it as his own—40 MAD 108 *Quære*, whether it will be legal for the succeeding Magistrate to date sign and pronounce the judgment written by his predecessor, when the accused demands a *de novo* trial (under sec 350)²—40 MAD 108

SUB SECTION (3)—*Judgment in the alternative*—The 'doubt' in sub-section (3) is the same as that referred to in sec 236, *i.e.*, a doubt as to the application of law to the facts proved and not a doubt as to whether the accused had committed any offence See notes under sec 236 Where the judgment did not state in express terms that the Court was in doubt as to the question under which of two sections the offence fell, it was held that this was at most an irregularity and did not vitiate the judgment—2 Weir 110

SUB-SECTION (1)—*Judgment of acquittal*—Under sub-section (1), if the judgment is one of acquittal the accused is entitled to be discharged from custody immediately on the judgment of acquittal

being pronounced, and his further detention becomes unlawful. No formal warrant of release addressed by the Court to the Superintendent of the Jail is necessary; it is for the jail authorities (in whose custody the accused remained) to satisfy themselves of the result of the trial—5 M H. C R App 2

SUB-SECTION (5) —Judgment in capital cases—Judges are bound to pass a capital sentence in a case of murder when they believe the evidence, and they must not shrink from doing their duty—7 W R 33 It is highly improper that a Sessions Judge should pass a sentence of death and at the same time in his reference to High Court recommend for mercy—M H C Pro 24-1 1866 A person convicted of murder should ordinarily be sentenced to death. To justify the passing of a sentence of transportation for life, there should be really extenuating circumstances, and not merely absence of aggravating circumstances—18 Cr L J 113 (BUH), 1 L B R 216 The fact that the crime was committed without premeditation in the heat of passion upon a sudden quarrel is not an extenuating circumstance—18 Cr L J 113

Where the Judge convicts the accused of murder and passes on him the alternative sentence of transportation for life, he should state his reasons for not passing the capital sentence—1864 W R 27 The fact that the accused is a woman is not a sufficient ground for passing a sentence of transportation instead of one of death—8 A W N 134 The fact that the body of the murdered man has not been found is not a sufficient ground—3 ALL 393 2 A W N 160, 1 A W N 112, Contra—11 W R 20 The fact that the accused is a pregnant woman is not a sufficient ground for commutation of sentence—15 W R 66, in such a case the execution is deferred till after delivery—See sec 382 (In the notable Delhi trial of Clark and Mrs Fulham, the latter being pregnant at the time, a sentence of transportation was passed instead of a death sentence)

A sentence of death was commuted to transportation for life, where owing to an aperture in the neck of the accused communicating with the larynx, it was likely that if he were hanged, a complete severance of the head from the body would ensue—2 C L R 215 Where the Sessions Judge feels reasonable doubt whether a sentence of death would be the proper penalty, the doubt, like all other doubts, should be given in favour of the accused, and a sentence of transportation should be passed. In such a case it is highly improper for the Sessions Judge to pass a sentence of death and to leave the respon-

sibility to the High Court, of commuting the sentence, if necessary—
3 L B R 111

HEADS OF CHARGE TO THE JURY —Under this section the Judge is not required to write out *in extenso* the charge which he addresses to the jury. He is to record merely the heads of the charges. The heads of charges mean that the Judge must faithfully record the lines upon which he addressed the jury both on the evidence and on the law, and the object of these heads of charges is to inform the High Court should occasion arise of what direction he gave in law to the jury and the nature of the summing up of the evidence not only for the prosecution but also for the defence. The headings of charge should record in an intelligible form and with sufficient fulness the points of law and directions given by the Judge to the jury and the record should represent with absolute accuracy the substance of the charge by the Judge to the jury—1 P L J 317, 36 CAL 281, 39 AIL 348. The readings of charges should contain such statement as will enable the Appellate Court to decide whether the evidence has been properly laid before the jury, or whether there has been any misdirection in the charge—23 W R 32, 23 A W N 232, 25 CAL 736, 10 BOV L R 365, 34 CAL 698, 39 ALL 348.

Where a joint trial is held of several offences some of which are triable by jury and others with the aid of assessors and in respect of the latter offences the jurors become assessors it is the duty of the Sessions Judge to pronounce a judgment containing the particulars specified in this section, in respect of the latter offences. A reference to the charge to the jury is not a sufficient compliance with the requirements of this section—Ritalal 126.

APPELLATE JUDGMENT —It should be observed that section 421 of the Code extends the provisions of section 367 to the judgments of the Lower Appellate Courts and it is essential that the judgment of such Courts should comply with the provisions of this section—*Cal G. R. & C. O. 1909* 36. An appellate judgment like the judgment of the Court of the first instance must fulfil the conditions laid down in this section that is the judgment must state the points for determination, the decision thereon and the reasons for that decision—17 BOM L R 1085, 2 P J T 616, 2 P L J 225, 21 Cr L J 223. Where the Appellate Court merely rejected the appeal without specifying the points the appeal was ordered to be allowed—1576 P R 9.

with a judicial mind—18 Cr L J 689, if it does not consider the evidence for the defence, nor even allude to it, it is defective—7 M L T 182, 1912 M W N 881, 18 Cr L J 689 Even though the Counsel for the appellant does not refer to the defence evidence it is the duty of the Appellate Court to look into that evidence and after dealing with it come to its own decision—40 CAL 376 Where a District Magistrate disposed of an appeal in a case under section 110 in which a large mass of evidence had been produced on both sides by a short judgment dealing with some general observations upon the volume of evidence which was put before him and without proper consideration thereof *held* that the judgment was not in accordance with law—19 A L J 921 But the Appellate Court is not bound *to give its opinion as to the character of the evidence in prolix detail*—1804 W R 6, 19 ALL 506 Where in the judgment of the first Court, evidence was set at great length and reasons fully explained the judgment of the Appellate Court which confirms the judgment of the trial Court does not become defective in law by reason of the fact that it does not set out again in detail the whole of the evidence and the reasons for believing the witnesses, if it appears from the judgment that the Appellate Court appreciated the points for determination and considered the evidence and appreciated the arguments adduced against the credibility of the prosecution witnesses—20 Cr L J 238 (CAL) But although as a general rule it is not incumbent on the Appellate Court when confirming a decision of the Lower Court, to set forth its reasons in full still if there is anything peculiar in the circumstances of a case the Appellate Court should notice it—8 B H C R 101 But it is not a sufficient compliance with the requirements of this section if the Appellate Court states no reasons whatsoever and confirms the judgment of the Lower Court in these general terms “I see no reason for distrusting the finding of the Lower Court —13 CAL 110 8 A W N 280 6 A W N 289, or “after reading the evidence and hearing the counsel I am of opinion that the Lower Court has decided the case rightly I find no ground for interference appeal is dismissed —21 CAL 120 22 CAL 211, 20 CAL 353 19 ALL 506 or “the prosecution evidence is sufficient for the conviction I decline to interfere —Weir (3rd Edn) 1030 or “I have perused the judgment of the Lower Court and I agree with the findings arrived at by the learned trying Magistrate and convict all the accused for the offence of rioting as stated in the charge —20 Cr L J 111 (Patna)

(2) No sentence of transportation

Sentence of trans shall specify the place to which the
portation. person sentenced is to be transported

<p>369. No Court, other than a High Court, when it has signed its judgment, shall alter or review the same, except as provided in Ss. 395 and 484 or to correct a clerical error.</p>	<p>369. <i>Save as otherwise provided by this Code or by any other law for the time being in force or, in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court when it has signed its judgment, shall alter or review the same, except to correct a clerical error</i></p>
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CHANGE —This section has been amended by sec. 101 of the Criminal Procedure Code Amendment Act, 1923

The wording of the old section admitted of the interpretation that High Courts had unlimited powers of altering or reviewing their judgments (though such interpretation was never put in any of the decided cases). The present section as now amended lays down that the High Court has no power to alter or review its judgment except as provided by this Code or by the Letters Patent. The references to sections 395 and 184 have been omitted, because there are cases other than those referred to in these two sections, in which a review of judgment is possible, e.g., section 131. See the *Report of the Joint Committee of 1922*.

SCOPE OF SECTION —Although this section refers in express terms to *judgments* under Chapter XXVI of the Code, still it is clear that the principle laid down herein applies also to *final orders which are in the nature of judgments*—22 BOM 919. An order which is passed on full enquiry and after hearing both sides is in the nature of a judgment, and such an order cannot be altered after it is once passed and signed. Thus, an order of a District Magistrate passed after full enquiry, refusing to deliver to the Political Superintendent of a Foreign State property seized in execution of a search warrant, cannot be altered by the Magistrate himself. The only course open to the Magistrate is to make a reference to the High Court, and have his own order cancelled—22 BOM 919. An order under Chapter XII

is in the nature of a judgment and a Magistrate having passed an order under Section 116 cannot cancel the order and pass an order under Section 117 instead—16 Cr L J 221 (PATNA).

An order in sanction proceedings (now abolished) comes under this section and a Sessions Judge refusing to revoke a sanction has no jurisdiction to review his order and revoke it—21 BOM 70, (1911) 2 M W N 431. A final order in maintenance proceedings (see 188) is in effect a judgment and the Magistrate cannot review a final order passed in such a proceeding—21 C W N 311.

But this section does not apply to an order of dismissal of complaint under Section 235. Such an order is not a judgment within the meaning of this section—29 MAD 126 and the Magistrate can rehear the complaint—11 Cr L N L R 18.

An order dismissing a summons case for default of appearance under section 247 is in the nature of a judgment and a Magistrate cannot revive the case once dismissed for default—1 C W N 26. But it is competent for a Magistrate to discharge a warrant case in which he has discharged the accused person under section 253 or 259—29 CAL 726, 28 CAL 652, 7 C W N 527, 28 MAD 310.

So also it is open to the Appellate Court to rehear an appeal which has been summarily dismissed by itself for default of appearance of the pleader—7 M H C R APP 29. *Contra*—1 BOM 101.

ALTERATION OF JUDGMENT—No Judge or Magistrate can add to or alter the proceedings or judgment in any case after they are signed and published—10 C W N 1062, 21 W R 19, 23 BOM 50. It is especially irregular when made in the absence of the accused, and without notice to him—10 C W N 1062, 12 BOM L R 521; 19 Cr L J 225 (PAT). Where a Magistrate after signing and pronouncing judgment in open Court on the same day enhanced the sentence on the request of the accused in order to make his order appealable it was held that though the Magistrate acted with the best of motives yet the alteration of the sentence was illegal—3 A W N 16. Where the accused was charged with theft (379 I P C) and also with section 75 (previous conviction) and 379 I P C, and the Sessions Judge at first tried the accused on the first charge alone and convicted and sentenced him, and he next inquired into the further charge of previous convictions it was held that the subsequent proceedings with reference to previous convictions were not valid, because after the judgment including the sentence was pronounced in the trial on the first charge there was no power to review or alter

the same under this section—42 BOM 202 A Magistrate after passing the sentence and signing it, cannot even alter the *date* from which the sentence is to run—Ratanlal 801 It is also most unwarrantable on the part of the Judge to add a note to his judgment, by which he tries to throw doubts on the conclusion at which he had arrived on the evidence—2 ALL 33 But where a Sessions Judge on appeal in annulling a conviction omits to order a retrial, he is not precluded by this section from passing such an order subsequently Such an order does not amount to an alteration of judgment—3 MAD 48

REVIEW —A judgment or final order pronounced and signed in accordance with the provisions of section 367 cannot be altered or reviewed by the Court which gives such judgment or order—1916 P R 25 Where an illegal sentence of flogging in addition to imprisonment was passed by the Magistrate and the illegality was discovered before execution but after the sentence has been pronounced and signed, it was held that such sentence could be altered only by the High Court, and not by the Magistrate himself—Weir (3rd Edn) 983 Where a Sessions Judge or a Magistrate once sentences an offender to pay a fine but omits through oversight to pass a sentence of imprisonment in default of payment of fine, it is not open to him to pass the order subsequently The proper course in such a case is to submit proceedings to the High Court and ask that Court in its revisional jurisdiction to inflict imprisonment in default of payment of fine—21 BOM L R 546 A Sessions Judge has no power to alter or set aside a conviction and sentence once signed by him even on the ground that the sentence passed by him was illegal—23 W R 49 Where a Sessions Judge rejected a criminal appeal on the ground that it was barred by limitation but subsequently on the representation by the prisoner, he admitted the appeal and after hearing it, acquitted the accused it was held that the Sessions Judge had no power to readmit the appeal—19 BOM 732, 6 BOM L R 360 It is not open to a Sessions Judge after he has once accepted the verdict of the jury and has postponed the case for passing sentence, to reconsider his order and refer the case to the High Court—17 section 367 but he must pass sentence on the person awaiting trial before the verdict It is not open to the High Court to reconsider his order more

section 148 (3) and such latter order is not an alteration or review of his judgment in the original case within the meaning of this section—17 CAL 374

Further inquiry—The terms of this section must be read as controlled by section 137 (now 136). That section does not limit the power of a District Magistrate to make further inquiry into a case in which an order of dismissal or discharge may have been passed by a subordinate Magistrate and there is no bar to a District Magistrate making further inquiry into a case in which such order may have been passed by himself—25 CAL 162

PROPER PROCEDURE—When a mistake has been made in the judgment (e.g. when an appeal has been erroneously dismissed as time barred or when an illegal sentence has been passed) it is not open to the Judge or Magistrate to alter or review his judgment or order, but the only course open to him is to submit the case to the High Court—6 BOM L R 360 1 BIR S R 351, 23 W R 19, Weir (3rd Edn) 983, 22 BOM 319 23 BOM L R 816

POWER OF HIGH COURT TO ALTER ITS JUDGMENT—See notes under "change" above. The law is now the same as it practically was before. Curiously enough in spite of the words 'other than a High Court' occurring in the old section the High Court had practically no power to alter or review its own judgment under the old law. It has even been remarked in 14 CAL 42 that so far as the High Court is concerned, there is no substantive enactment in this section, it does not confer any power on the High Court, nor does it take away any of the powers which existed in that Court before the passing of this section.

The Legislature has not conferred in express words upon the High Court the power of reviewing its judgment in all criminal cases as it has done in all civil cases. The provisions of the old section so far as they affect a High Court merely apply to questions of law arising in its original criminal jurisdiction and which are reserved and subsequently disposed of under the provisions of section 434 and the corresponding sections of the Letters Patent—7 ALL 672. The words 'other than a High Court' do not give the Division Bench of the High Court power to review its judgment in a criminal appeal. The words are to be accounted for by the power of review given to the High Court under section 434 on points specially reserved by the Judge presiding at the High Court Sessions—Ratanlal 791. In other words the High Court cannot entertain an application to review a judgment

the same under this section—42 BOM 202 A Magistrate after passing the sentence and signing it cannot even alter the *date* from which the sentence is to run—Ratanlal 804 It is also most unwarrantable on the part of the Judge to add a note to his judgment by which he tries to throw doubts on the conclusion at which he had arrived on the evidence—2 ALL 33 But where a Sessions Judge on appeal in annulling a conviction omits to order a retrial he is not precluded by this section from passing such an order subsequently Such an order does not amount to an alteration of judgment—3 MAD 48

REVIEW —A judgment or final order pronounced and signed in accordance with the provisions of section 367 cannot be altered or reviewed by the Court which gives such judgment or order—1916 P R 25 Where an illegal sentence of flogging in addition to imprisonment was passed by the Magistrate and the illegality was discovered before execution but after the sentence has been pronounced and signed it was held that such sentence could be altered only by the High Court and not by the Magistrate himself—Weir (3rd Edn) 983 Where a Sessions Judge or a Magistrate once sentences an offender to pay a fine but omits through oversight to pass a sentence of imprisonment in default of payment of fine, it is not open to him to pass the order subsequently The proper course in such a case is to submit proceedings to the High Court and ask that Court in its revisional jurisdiction to inflict imprisonment in default of payment of fine—23 BOM L R 816 A Sessions Judge has no power to alter or set aside a conviction and sentence once signed by him even on the ground that the sentence passed by him was illegal—23 W R 49 Where a Sessions Judge rejected a criminal appeal on the ground that it was barred by limitation, but subsequently on the representation by the prisoner, he admitted the appeal and after hearing it acquitted the accused it was held that the Sessions Judge had no power to re-admit the appeal—19 BOM 732, 6 BOM L R 360 It is not open to a Sessions Judge after he has once accepted the verdict of the jury and has postponed the case for passing sentence, to reconsider his order and refer the case to the High Court under section 367 but he must pass sentence on the person awaiting sentence on the verdict It is not open to him to reconsider his order any more than it is open to him to reconsider his order after it has been recorded—1 C W N 693

A Magistrate who makes an order under section 115 without any direction as to costs has power to order the same subsequently under

section 148 (3) and such latter order is not an alteration or review of his judgment in the original case within the meaning of this section—17 CAL. 974

Further inquiry—The terms of this section must be read as controlled by section 437 (now 436). That section does not limit the power of a District Magistrate to make further inquiry into a case in which an order of dismissal or discharge may have been passed by a subordinate Magistrate and there is no bar to a District Magistrate making further inquiry into a case in which such order may have been passed by himself—28 CAL. 162

PROPER PROCEDURE—When a mistake has been made in the judgment (e.g. when an appeal has been erroneously dismissed as time barred or when an illegal sentence has been passed) it is not open to the Judge or Magistrate to alter or review his judgment or order, but the only course open to him is to submit the case to the High Court—6 BOM. L. R. 360, 1 HILL & R. 351, 23 W. R. 19, Weir (3rd Edn) 983, 22 BOM. 919, 23 HOB. L. R. 816

POWER OF HIGH COURT TO ALTER ITS JUDGMENT—See notes under "change" above. The law is now the same as it practically was before. Curiously enough in spite of the words 'other than a High Court' occurring in the old section the High Court had practically no power to alter or review its own judgment under the old law. It has even been remarked in 14 CAL. 42 that so far as the High Court is concerned there is no substantive enactment in this section, it does not confer any power on the High Court, nor does it take away any of the powers which existed in that Court before the passing of this section.

The Legislature has not conferred in express words upon the High Court the power of reviewing its judgment in all criminal cases as it has done in all civil cases. The provisions of the old section so far as they affect a High Court merely apply to questions of law arising in its *original* criminal jurisdiction and which are reserved and subsequently disposed of under the provisions of section 434 and the corresponding sections of the Letters Patent—7 ALL. 672. The words 'other than a High Court' do not give the *Division Bench* of the High Court power to review its judgment in a criminal appeal. The words are to be accounted for by the power of review given to the High Court under section 434 on points specially reserved by the Judge presiding at the High Court Sessions—Ratanlal 791. In other words the High Court cannot entertain an application to review a judgment

enable the High Court in revision to judge the sufficiency of materials before the Magistrate to support the conviction—13 CAL 272 A Presidency Magistrate who tries and convicts an accused in a summary trial is bound to give reasons for the conviction—31 M L T 400

The imprisonment referred to in this clause is *substantive* imprisonment. A sentence of imprisonment in default of payment of fine is not a sentence of imprisonment within the meaning of this section—14 CAL 174

371. (1) On the application of the accused a copy of the judgment, or when he so desires a Copy of judgment, translation in his own language
 etc., to be given to accused on application if practicable or in the language of the Court shall be given to him without delay. Such copy shall in any case other than a summons case be given free of cost.

(2) In trials by jury in a Court of Session a copy of the heads of the charge to the jury shall on the application of the accused be given to him without delay and free of cost.

(3) When the accused is sentenced to death by a Sessions Judge such Judge shall further inform Case of person sentenced to death sen him of the period within which if he wishes to appeal his appeal should be preferred.

The application for a copy of judgment need not be stamped. See Ratanlal 364.

372. The original judgment shall be filed with the record of proceedings and where the Judgment when to be translated original is recorded in a different language from that of the Court and the accused so requires a translation thereof into the language of the Court shall be added to such record.

373. In cases tried by the Court of Session the Court shall forward a copy of its finding and sentence (if any) to the District Magistrate within the local limits of whose jurisdiction the trial was held.
 Court of Session to send copy of finding and sentence to District Magistrate

CHAPTER XXVII

OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION

374. When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court

Sentence of death to be submitted to Court of Session.

When the record of a case in which sentence of death has been passed is submitted to the High Court under section 374, all the Police Diaries connected with the case should be simultaneously forwarded—*CL G R d C O p 19*

375. (1) If when such proceedings are submitted the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such

Power to direct further inquiry to be made or additional evidence to be taken

inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session

(2) Such inquiry shall not be made nor shall such evidence be taken in the presence of jurors or assessors, and, unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when the same is made or taken

(3) When the inquiry and the evidence (if any) are not made and taken by the High Court the result of such inquiry and the evidence shall be certified to such Court

Under this section the High Court can take additional evidence itself. In 25 BOM 168 the High Court admitted in evidence a confession rejected by the Sessions Judge. In 1911 P W R 16, the High Court (then Chief Court) admitted further evidence and inspected the building where the offence was alleged to have been committed

The High Court when recording further evidence under this section can dispense with the presence of the accused especially where the additional evidence is recorded by itself—21 MAD 523

The High Court acting under this section is not entitled with a view to make its opinion still more conclusive with reference to the discrepancies in the testimony of the witnesses on which the Trial Judge has properly dwelt, to test that testimony still further by

reading the earlier statements of those witnesses made to the police and entered in the police diary, in other words, to treat as evidence what could be used at all events for the purpose of discrediting those witnesses—44 C 876 (P C)

376. In any case submitted under S 374, whether tried

Power of High Court with the aid of assessors or by jury, the
to confirm sentence or annul conviction High Court—

(a) may confirm the sentence, or pass any other sentence warranted by law, or

(b) may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him or order a new trial on the same or an amended charge, or

(c) may acquit the accused person.

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of

POWER OF HIGH COURT—Though a High Court has power to substitute its own finding for the unanimous verdict of the jury in a trial for murder, when the sentence comes on for confirmation before the High Court, still as a matter of practice the High Court will not generally allow the verdict to be attacked arbitrarily. It is necessary that the convict must show *prima facie* that the verdict is unsupported by evidence. The High Court will not permit the same latitude in the criticism of the evidence before the jury that it allows in an ordinary appeal from a trial with assessors—15 S L R 103. The High Court will undoubtedly interfere with the verdict if it was perverse or if evidence has been improperly admitted or excluded or if there is a misdirection by the Judge—*Ibid*

High Court may go into facts and law—When a case is submitted under section 371 the High Court is bound to go into the *facts* as well as the law although the conviction is by the verdict of the jury—19 W R 57, 2 C W N 49, 17 BOM L R 1072, and the High Court's power under this section is not limited as in appeal—2 C W N 49. In a case referred to the High Court under section 371 for confirmation of a death sentence it is the practice of the High Court to be satisfied on the facts as well as the law of the case that the conviction is right, before it proceeds to confirm the sentence—Ratanlal

Where the High Court hears the appeal of a co-accused not sentenced to death along with a reference under section 371 in respect of a person sentenced to death it was held under the old law that it is not open to the High Court to go into the facts in the appeal—2 C W N 19 and the appeal must be limited, as laid down in the sections 418 and 421 (d) to points of law only—*Ibid* See also 11 B L R 11 But now see the new subsection (2) of section 418

Question of jurisdiction —In determining whether the sentence should be confirmed the High Court may also consider whether the conviction was by a Court of competent jurisdiction—2 ALL 218

COMMUTATION OF SENTENCE —Where the condition of the convict was such that if he were ordered to be hanged decapitation would ensue (owing to an aperture in the neck communicating with the larynx) the High Court commuted the sentence of death to one of transportation for life—2 C L R 21 In 17 C W N 1213 there being a difference of opinion among the Judges who heard the reference the case had to be referred to a third Judge (see 378) and there was a delay of six months in the High Court before the final decision was arrived at The third Judge upheld the conviction for murder but commuted the sentence of death into one of transportation on the ground that the capital sentence had been hung over the heads of the accused for six months owing to the delay in the High Court

Conviction for any other offence —Where the accused was tried before the Sessions Judge for murder and concealment of murder and was convicted of murder but no finding was given on the minor charge the High Court acquitted the accused of the charge of murder, and convicted him of the minor charge where there was evidence to support it in spite of the omission of the Sessions Judge to give any finding in respect of this minor charge—1913 P R 8 The Bombay High Court holds that in a reference under this section the High Court cannot alter a conviction for murder into one for culpable homicide not amounting to murder unless there is a petition of appeal along with the reference If no appeal is preferred, the only course is to order a retrial for the other offence—1 BOM 639 But there is nothing in this section to warrant such a view

RETRIAL —Where the evidence taken before the Court of Session was incomplete and further evidence was necessary before judgment could be properly pronounced upon the accused the High Court

The fact that the accused is a pregnant woman is not a sufficient ground for commutation of sentence—15 W R 66, in such a case, execution will be deferred until delivery, as provided by this section

The High Court is the only tribunal in which the law has vested the power of postponing the execution of a sentence of death passed on a woman found to be pregnant—2 Weir 441

The pregnancy of the woman should be certified by a civil surgeon—*Bombay Gazette* 1879, page 471

383. Where the accused is sentenced to transportation or imprisonment in cases other than those provided for by S 381, the Court passing the sentence shall forthwith forward a warrant to the jail in which he is, or is to be confined, and, unless the accused is already confined in such jail, shall forward him to such jail, with the warrant

Execution of sentences of transportation or imprisonment in other cases
Sentence when to commence—A sentence of imprisonment ought to commence from the time the sentence is passed. A sentence of imprisonment to take effect at a future date is bad in law. A Magistrate has no power to postpone the execution of the sentence at the request of the accused—12 W R 47. Where a Magistrate passes a sentence of imprisonment on an accused and admits him to bail in order that he may have the means of appealing it was held that the admission to bail did not postpone the sentence to a future date, the sentence commences at the proper period and there is nothing illegal—7 C I R 393 12 W R 47

The commencement of sentence cannot also be ante dated. A sentence of imprisonment for the time passed in the lock up is illegal, but a sentence of imprisonment until the rising of the Court is good and legal—1907 P W R 9

When a prisoner has been committed to jail under two separate warrants the sentence in the one to take effect from the expiry of the sentence in the other, the date of such second sentence shall in the event of the first sentence being remitted on appeal be presumed to take effect from the date on which he was committed to jail under the first or original sentence—*Cal G R & C O*, page 40

Where to be imprisoned—When a case is submitted to the High Court under section 307 and the High Court passes a sentence it does so as a Court of Reference and not in the exercise of its ordinary original jurisdiction and therefore it has power on conviction and

sentence to send the accused to jail outside the Presidency Town. The High Court is required to send the accused to the jail in which he would be confined by the Court submitting the case—29 CAL. 286

It is illegal for a Magistrate to direct the accused to be imprisoned in a Police Lock up—7 L. R. 62. A jail is a prison within the meaning of the Prisons Act and the Prisoners Act, but it does not include a police lock up—101

It is illegal to confine a person in a jail other than that mentioned in the warrant—11 CAL. 527 (cited under section 384)

Calculation of period of imprisonment—In calculating sentences of imprisonment, the day upon which the sentence is passed and the day of release ought to be included and considered as days of imprisonment. For example, a man sentenced on the 1st January to one month's imprisonment should be released on the 31st January, not on the 1st February. Vol. 6, O. No. 211 dated 22-11-81

384. Every warrant for the execution of a sentence of imprisonment shall be directed to the
 Direction of warrant for execution officer in charge of the jail, or other place in which the prisoner is, or is to be confined

The warrant of imprisonment must be signed by the Magistrate, and the signature should be affixed by pen and not by means of a stamp—6 MAD 396

The period of imprisonment should be definite. Thus, in an order under sec. 123 the Magistrate should state the period for which the accused is to be imprisoned in default of finding security, it is illegal to direct the accused to be imprisoned *until he gives security*—8 CAL. 611

It is illegal to confine a person to a jail other than that mentioned in the warrant. Where a sheriff's officer delivered over to the officer-in-charge of the Alipore Jail a judgment debtor who had been duly committed to the Presidency Jail, the confinement in the Alipore Jail was held to be illegal—14 CAL. 527

385. When the prisoner is to be confined in a jail, the
 Warrant with whom warrant shall be lodged with the jailor to be lodged

386. (1) Whenever an offender has been sentenced to
 fine Warrant for levy of pay a fine, the Court passing the sentence may take action for the re-

tence, or if an appeal is made within that time, until the sentence is confirmed by the Appellate Court, but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days, or, in case of an appeal, as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence

inflicted until fifteen days from the date of the sentence, or if an appeal is made within that time, until the sentence is confirmed by the Appellate Court, but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days, or, in case of an appeal, as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence

(2) The whipping shall be inflicted in the presence of the officer in charge of the jail, unless the Judge or Magistrate orders it to be inflicted in his own presence

(3) No accused person shall be sentenced to whipping in addition to imprisonment, when the term of imprisonment to which he is sentenced is less than three months

This section has been amended by the Criminal Law Amendment Act, 1923. The old section contemplated only those cases where the accused was sentenced to whipping as well as to imprisonment, if the accused was sentenced to whipping only, this section did not apply, and the sentence of whipping could not be postponed—2 Weir 416. But the newly added clause (a) now provides for such cases.

Postponement of whipping till after imprisonment—Where a person has been sentenced to whipping as well as imprisonment, the whipping may be postponed, as provided by this section, until 15 days from the date of sentence or until confirmation of the sentence on appeal, but it is illegal to postpone the sentence of whipping till after the term of imprisonment had expired—6 M H C R App 38, 7 M H C R App 29, 1 BOM L R 436, Ratanlal 803 1 A W. N 138, 4 BOM L R 329. Where a Magistrate ordered that the prisoner be brought before him at the expiration of the sentence of imprisonment and that the sentence of whipping should then be carried out, the High Court cancelled the sentence of whipping as having become inoperative and incapable of being carried out by lapse of time—20 W R 72.

'As soon as practicable'—The whipping must be carried into effect as soon as practicable after the expiry of the time specified in

this section If through accident, or neglect or willful breach of duty of the officer the sentence of whipping was not carried into execution, the prisoner is not thereby freed from liability to undergo the sentence still remaining unexecuted—Ratanlal 136

Double sentence of whipping —An accused cannot be sentenced to a double sentence of whipping when he is convicted of two offences, thus, where a person is convicted of offences under sections 154 and 380 I P C, it is illegal to pass a sentence of 15 stripes for each offence—Ratanlal 955

Sub section (3) —When a sentence of imprisonment of less than three months is awarded, an additional sentence of whipping is illegal —2 BOM L R 54

392. (1) In the case of a person of or over sixteen years of age whipping shall be inflicted with a light rattan not less than half an inch in diameter, in such mode, and on such part of the person, as the Local Government directs, and, in the case of a person under sixteen years of age, it shall be inflicted in such mode, and on such part of the person, and with such instruments, as the Local Government directs

(2) In no case shall such punishment exceed thirty stripes, and, in the case of a person under sixteen years of age, it shall not exceed fifteen stripes

Limit of number of stripes. *'Such part of the person'* —In case of a person of or over sixteen years of age, in C P Madras and Bengal the punishment of whipping is inflicted on the bare buttocks the offender being tied to a triangle, in Burma the punishment is inflicted on the breech, in Bombay, if the punishment is inflicted in private (*i.e.*, within the precincts of the prison) it shall be inflicted on the bare buttocks, and when inflicted in public (*i.e.* outside the Jail precincts), across the bare shoulders

In case of a person under sixteen years of age, in Bombay, U P, C P and Punjab the whipping is inflicted on the bare buttocks, but the offender is not tied to a triangle but simply held on it, or is held in some other convenient way, in Burma the whipping is inflicted on the breech, in Bengal it may be inflicted on the posteriors or on the hands as the Court may direct (Cal G R and C. O., page 62) "Having regard to the general feeling of the respectable classes of the people as to the degrading character of the punishment of

certificate is invalid, and the whole sentence may be carried out, the Magistrate cannot inflict the smaller number of stripes in accordance with the medical certificate, and in lieu of the rest of the stripes not inflicted he cannot award imprisonment under section 395—31 MAD 84

395. (1) In any case in which under S 394, a sentence of whipping is wholly or partially prevented from being executed, the offender shall be kept in custody till the Court which passed the sentence can revise it; and the said Court may, at its discretion,

Procedure if punishment cannot be inflicted under S 394

either remit such sentence, or sentence the offender in lieu of whipping, or in lieu of so much of the sentence of whipping as was not executed, to imprisonment for any term not exceeding twelve months or to a fine not exceeding five hundred rupees which may be in addition to any other punishment to which he may have been sentenced for the same offence

(2) Nothing in this section shall be deemed to authorize any Court to inflict imprisonment for a term or a fine of an amount exceeding that to which the accused is liable by law, or that which the said Court is competent to inflict

CHANGE —The italicised words have been added by section 105 of the Criminal Procedure Code Amendment Act 1923. "This Amendment enables a sentence of fine to be awarded in lieu of a sentence of whipping which cannot be carried out" —*Statement of Objects and Reasons* (1914)

Under the old law it was held that the Court had no power to revise a sentence of whipping by inflicting a fine—11 ALL 308, Weir (3r1 Idn) 993, 2 Weir 449. These cases are now rendered obsolete

'Wholly or partially prevented' —'Wholly prevented' refers to subsection (1) of section 391, 'Partially prevented' refers to subsection (2) of that section—31 MAD 84

'The Court which passed the sentence can revise it' —The only Court which can revise the sentence is the Court which passed the sentence. Even where a sentence of imprisonment and whipping passed by a District Magistrate was confirmed on appeal by the Sessions Judge still the Magistrate is not prevented from revising the sentence—1889 P R 10. But the words 'the Court which passed the sentence' do not mean the same officer who inflicted the sentence,

therefore, where a Magistrate who passed the original sentence of whipping was transferred, the District Magistrate who had jurisdiction over the whole district was competent to commute the sentence of whipping to one of imprisonment—1901 P. R. 33

Power of revision —The Court can revise the sentence of whipping by awarding solitary confinement in lieu of whipping, under this section—1899 P. R. 14 The Court may remit the sentence altogether, even though it is competent to inflict a term of imprisonment in lieu of whipping—1 L. B. R. 202

The imprisonment which the Court can award under this section must not exceed the term which the Court is competent to award. Where a Magistrate sentences the accused to the maximum term of imprisonment which he is competent to inflict as well as whipping, and the whipping cannot be carried out, he cannot sentence him to a further term of imprisonment in lieu of whipping but ought to remit the sentence of whipping altogether—2 Weir 419 21 M.L. 25, 1901 P. R. 11

396. (1) When sentence is passed under this Code on an escaped convict, such sentence, if of

Execution of sentences on escaped convicts death, fine or whipping, shall subject to the provisions hereinbefore contained, take effect immediately, and, if of imprisonment, penal servitude or transportation, shall take effect according to the following rules, that is to say—

(2) If the new sentence is severer in its kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect immediately

(3) When the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped, the new sentence shall take effect after he has suffered imprisonment, penal servitude or transportation, as the case may be, for a further period equal to that which, at the time of his escape remained unexpired of his former sentence

Explanation —For the purposes of this section—

- (a) sentence of transportation or penal servitude shall be deemed severer than a sentence of imprisonment,
- (b) a sentence of imprisonment with solitary confinement shall be deemed severer than a sentence of

certificate is invalid and the whole sentence may be carried out, the Magistrate cannot inflict the smaller number of stripes in accordance with the medical certificate, and in lieu of the rest of the stripes not inflicted he cannot award imprisonment under section 395—31 MAD 84

395. (1) In any case in which under S 394, a sentence of whipping is wholly or partially prevented from being executed the offender shall be kept in custody till the Court which passed the sentence can revise it, and the said Court may, at its discretion,

Procedure if punishment cannot be inflicted under S 394

either remit such sentence, or sentence the offender in lieu of whipping, or in lieu of so much of the sentence of whipping as was not executed, to imprisonment for any term not exceeding twelve months or to a fine not exceeding five hundred rupees which may be in addition to any other punishment to which he may have been sentenced for the same offence

(2) Nothing in this section shall be deemed to authorize any Court to inflict imprisonment for a term or a fine of an amount exceeding that to which the accused is liable by law, or that which the said Court is competent to inflict

CHANGE —The italicised words have been added by section 105 of the Criminal Procedure Code Amendment Act 1923. "This Amendment enables a sentence of fine to be awarded in lieu of a sentence of whipping which cannot be carried out"—*Statement of Objects and Reasons* (1911)

Under the old law it was held that the Court had no power to revise a sentence of whipping by inflicting a fine—11 ALL 308, Weir (3rd Edn) 993, 2 Weir 449. The e cases are now rendered obsolete

'*Wholly or partially prevented*' —'Wholly prevented' refers to subsection (1) of section 394. 'Partially prevented' refers to subsection (2) of that section—31 MAD 81

'*The Court which passed the sentence can revise it*' —The only Court which can revise the sentence is the Court which passed the sentence. Even where a sentence of imprisonment and whipping passed by a District Magistrate was confirmed on appeal by the Sessions Judge, still the Magistrate is not prevented from revising the sentence—1889 P II 10. But the words 'the Court which passed the sentence' do not mean the same officer who inflicted the sentence.

therefore where a Magistrate who passed the original sentence of whipping was transferred, the District Magistrate who had jurisdiction over the whole district was competent to commute the sentence of whipping to one of imprisonment—1901 P R 33

Power of revision —The Court can revise the sentence of whipping by awarding solitary confinement in lieu of whipping, under this section—1899 P R 14 The Court may remit the sentence altogether, even though it is competent to inflict a term of imprisonment in lieu of whipping—1 L B R 202

The imprisonment which the Court can award under this section must not exceed the term which the Court is competent to award Where a Magistrate sentences the accused to the maximum term of imprisonment which he is competent to inflict as well as whipping and the whipping cannot be carried out he cannot sentence him to a further term of imprisonment in lieu of whipping but ought to remit the sentence of whipping altogether—2 Weir 449 21 AIL 26 1901 P R 11

396. (1) When sentence is passed under this Code on an escaped convict, such sentence, if of

Execution of sentences on escaped convicts death fine or whipping shall subject to the provisions hereinbefore contained, take effect immediately, and if of imprisonment penal servitude or transportation shall take effect according to the following rules that is to say—

(2) If the new sentence is severer in its kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect immediately

(3) When the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped the new sentence shall take effect after he has suffered imprisonment penal servitude or transportation as the case may be, for a further period equal to that which at the time of his escape remained unexpired of his former sentence

Explanation —for the purposes of this section—

(a) sentence of transportation or penal servitude shall be deemed severer than a sentence of imprisonment,

(b) a sentence of imprisonment with solitary confinement shall be deemed severer than a sentence of

certificate is invalid and the whole sentence may be carried out, the Magistrate cannot inflict the smaller number of stripes in accordance with the medical certificate, and in lieu of the rest of the stripes not inflicted he cannot award imprisonment under section 395—31 MAD 84

395. (1) In any case in which under S 394, a sentence of whipping is wholly or partially prevented from being executed, the offender shall be kept in custody till the Court which passed the sentence can revise it; and the said Court may, at its discretion, either remit such sentence, or sentence the offender in lieu of whipping, or in lieu of so much of the sentence of whipping as was not executed, to imprisonment for any term not exceeding twelve months *or to a fine not exceeding five hundred rupees* which may be in addition to any other punishment to which he may have been sentenced for the same offence

(2) Nothing in this section shall be deemed to authorize any Court to inflict imprisonment for a term *or a fine of an amount exceeding that to which the accused is liable by law*, or that which the said Court is competent to inflict

CHANGE—The italicised words have been added by section 105 of the Criminal Procedure Code Amendment Act 1923 “This Amendment enables a sentence of fine to be awarded in lieu of a sentence of whipping which cannot be carried out”—*Statement of Objects and Reasons* (1914)

Under the old law it was held that the Court had no power to revise a sentence of whipping by inflicting a fine—11 ALL 308, Weir (3rd Edn) 993, 2 Weir 149. These cases are now rendered obsolete.

‘*Wholly or partially prevented*’—‘Wholly prevented’ refers to subsection (1) of section 394, ‘Partially prevented’ refers to subsection (2) of that section—31 MAD 84

‘*The Court which passed the sentence can revise it*’—The only Court which can revise the sentence is the Court which passed the sentence. Even where a sentence of imprisonment and whipping passed by a District Magistrate was confirmed on appeal by the Sessions Judge still the Magistrate is not prevented from revising the sentence—1859 P R 10. But the words ‘the Court which passed the sentence’ do not mean the same officer who inflicted the sentence,

therefore where a Magistrate who passed the original sentence of whipping was transferred, the District Magistrate who had jurisdiction over the whole district was competent to commute the sentence of whipping to one of imprisonment—1901 P. R. 73

Power of remission —The Court can revise the sentence of whipping by awarding solitary confinement in lieu of whipping under this section—1899 P. R. 14. The Court may remit the sentence altogether, even though it is competent to inflict a term of imprisonment in lieu of whipping—1 L. B. R. 202

The imprisonment which the Court can award under this section must not exceed the term which the Court is competent to award. Where a Magistrate sentences the accused to the maximum term of imprisonment which he is competent to inflict as well as whipping and the whipping cannot be carried out he cannot sentence him to a further term of imprisonment in lieu of whipping but ought to remit the sentence of whipping altogether—2 Weir 119 21 M.L. 25 1901 P. R. 11

396. (1) When sentence is passed under this Code on an escaped convict, such sentence, if of

Execution of sentence on escaped convicts death fine or whipping, shall subject to the provisions hereinbefore contained, take effect immediately, and if of imprisonment penal servitude or transportation, shall take effect according to the following rules, that is to say—

(2) If the new sentence is severer in its kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect immediately

(3) When the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped, the new sentence shall take effect after he has suffered imprisonment penal servitude or transportation, as the case may be, for a further period equal to that which, at the time of his escape remained unexpired of his former sentence

Explanation —For the purposes of this section—

(a) sentence of transportation or penal servitude shall be deemed severer than a sentence of imprisonment,

(b) a sentence of imprisonment with solitary confinement shall be deemed severer than a sentence of

the same description of imprisonment without solitary confinement, and

- (c) a sentence of rigorous imprisonment shall be deemed severer than a sentence of simple imprisonment with or without solitary confinement

SENTENCE —The word *sentence* includes an order of imprisonment passed under section 123—Ratanlal 774, *Contia* —2 L B R 72

SEVERER SENTENCE —What this section contemplates is that the severer sentence must be undergone first. Where the accused who was a life convict under sentence of transportation for murder was convicted for attempting to escape from lawful custody and was sentenced to four months' rigorous imprisonment, the latter sentence must not commence immediately, but should be undergone after the expiry of the sentence of transportation—Ratanlal 965

397. When a person already undergoing a sentence of imprisonment, penal servitude or transportation is sentenced to imprisonment, penal servitude or transportation, such imprisonment, penal servitude or transportation shall commence at the expiration of the imprisonment, penal servitude or transportation to which he has been previously sentenced *unless the court directs that the subsequent sentence shall run concurrently with such previous sentence*

Provided that if he is undergoing a sentence of imprisonment, and the sentence on such subsequent conviction is one of transportation the Court may, in its discretion, direct that the latter sentence shall commence immediately or at the expiration of the imprisonment to which he has been previously sentenced

Provided, further, that where a person who has been sentenced to imprisonment by an order under S. 123 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately

The italicised words and the second proviso have been added by section 106 of the Criminal Procedure Code Amendment Act, 1927. The reasons are stated below

GENERAL RULE AND EXCEPTION —The general rule is that a sentence commences to run from the time of its being passed, and this section creates an exception in the case of persons already undergoing imprisonment, and postpones the operation of the subsequent sentence until after the expiry of the previous sentence—3 B L R A C 50, 20 W R 70

'UNDERGOING IMPRISONMENT' —A person is said to be *undergoing* an imprisonment the moment the sentence of imprisonment is passed, though he has not yet been sent to jail. Therefore, where a person is tried on the same day for two different offences in two different trials, then as soon as the first trial is over and he is convicted and sentenced he is said to undergo imprisonment, and if he is convicted and sentenced in the second trial also, he is said to be sentenced to imprisonment 'while already undergoing a sentence of imprisonment' within the meaning of this section—2 Weir 451. But in 19 Cr L J 207 (ALL), it has been held that until an accused has actually passed into jail, he cannot be said to be undergoing imprisonment, and therefore where two sentences of imprisonment were passed in two trials on the same accused on the same day, this section does not apply and the accused can not be said to be undergoing imprisonment under the first trial, as soon as the sentence is passed, therefore the second imprisonment need not commence after the expiry of the imprisonment awarded in the first trial the Magistrate may order that the two sentences should be concurrent.

SEQUENCE OF SENTENCES —The meaning of this section is that sentences will take effect in the order in which they were passed. The sentence which is first passed and which the accused is undergoing must be given effect to first and any subsequent sentence passed upon *the accused must follow after the expiration of the first sentence*. Where a Magistrate passes separate sentences of imprisonment on the same accused in separate trials but on the same day the sentences will take effect in the order in which they were passed, by the terms of this section, and the Magistrate need not therefore give any direction in his judgment in respect of the same—2 Weir 451. In another case appearing on the same page of the same report (2 Weir 451), however, it is laid down that the direction that the sentence in one case is to run from the date of the expiration of the sentence in a previous case passed on the same day must appear in the body of the sentence and should also be inserted in the warrant.

But the above rule as to the sequence of sentences applies only to the 1st para of this section. It is only the sentences mentioned in para 1 that can be directed to take effect in the order in which they were passed—Ratanlal 300. As regards the sentences mentioned in the proviso, the Magistrate has a discretion to direct either that the subsequent sentence should take effect after the expiration of the prior sentence or that it should take effect at once.

Imprisonment in foreign territory—Where a person sentenced to imprisonment in a foreign territory is subsequently convicted of an offence in British India it is competent for the Magistrate to pass a sentence which shall take effect after the expiration of the sentence in the foreign state—20 MAD 444.

CONCURRENT SENTENCES—It has been held under the old section that a Magistrate cannot direct that the subsequent sentence shall run concurrently with the previous sentence, because a Magistrate can pass concurrent sentences only when the offences are tried at one and the same trial (See sec 35)—20 C W N 1300, Ratanlal 532, Ratanlal 18, 2 BOM L R 111, 4 BOM L R 876, 1912 M W N 396, 2 Weir 453, 19 A L J 310, 11 A L J 263, 1912 P L R. 20, 2 S L R 23, 15 C P L R 57, 4 L B R 147, even where the trials are held on the same day, the Magistrate cannot make the sentences in the two trials concurrent—1894 P R 12. But now the amendment made at the end of para 1 of this section will allow the subsequent sentence to run concurrently with the previous one.

'AT THE EXPIRATION OF—If one sentence is reversed—A person was convicted by a Magistrate and sentenced to 2 years' imprisonment, and a month afterwards he was sentenced to three years' imprisonment by the Court of Session, which directed the sentence to take effect on the expiration of the sentence passed by the Magistrate. On appeal, the conviction and sentence passed by the Magistrate were set aside. It was held that the sentence by the Sessions Court must be deemed to have commenced from the time it was ordered to commence viz after the expiration of the Magistrate's sentence whether by reversal or completion of the punishment, and not before—Ratanlal 197, Ratanlal 523. But in 2 Weir 150 under similar circumstances, it was held that the imprisonment already undergone must be reckoned as imprisonment under the sentence in the conviction which was not reversed. So also, the Calcutta High Court lays down "Where a prisoner has been committed to jail under two separate warrants, the

sentence in the one to take effect from the expiry of the sentence in the other, the date of such second sentence shall in the event of the first sentence being remitted in appeal, be presumed to take effect from the date on which he was committed to jail under the first or original sentence"—Cal G II & C. O page 49 But these remarks can only apply where the sentences in the two trials are of the same kind; otherwise the Bombay rulings cited above should apply Those rulings are more reasonable and practical though the Madras case and the Calcutta High Court Rule are more favourable to the accused

FIRST PROVISIO —Where a person who is already undergoing imprisonment is sentenced by the Sessions Judge to transportation for life, the sentence of transportation passed by him will commence at the expiration of the previous sentence of the imprisonment, unless the Judge in his discretion makes a further order that the sentence of transportation shall take effect immediately—Ratanlal 391

An order directing that a sentence shall take effect on the expiration of another sentence is not a part of the judgment and may therefore be made after the judgment has been signed Therefore, where a Sessions Judge in ignorance that the accused is already undergoing imprisonment sentences him to transportation for life, it is subsequently open to him to order, even after the judgment has been signed that the sentence of transportation shall take effect immediately—Ratanlal 391

SECOND PROVISIO —This proviso lays down that if a person who is imprisoned under section 123 in default of furnishing security, is subsequently sentenced to imprisonment for an offence committed prior to the passing of the order under section 123 the latter sentence (i.e. the substantive sentence of imprisonment) shall take effect immediately This is also laid down in a large number of decided cases - 31 MAD. 515, 37 BO'1 178, 5 BOM L R 26, 8 N L R 20

Under the old law, there was no distinction whether the offence for which the person imprisoned under section 123 was subsequently convicted was committed *before* or *after* the making of the order under section 123 The law was that if a person undergoing imprisonment under section 123 was subsequently convicted of an offence and sentenced to imprisonment (whether this offence was committed before or after the sentence of imprisonment under section 123 was immaterial), the latter imprisonment must take effect at once and should not be postponed till after the expiry of the period of imprisonment awarded under section 123—Ratanlal 970; 2 Weir 452, 1

But the above rule as to the sequence of sentences applies only to the 1st para of this section. It is only the sentences mentioned in para 1 that can be directed to take effect in the order in which they were passed—Ratanlal 300. As regards the sentences mentioned in the proviso, the Magistrate has a discretion to direct either that the subsequent sentence should take effect after the expiration of the prior sentence, or that it should take effect at once.

Imprisonment in foreign territory—Where a person sentenced to imprisonment in a foreign territory is subsequently convicted of an offence in British India it is competent for the Magistrate to pass a sentence which shall take effect after the expiration of the sentence in the foreign state—20 MAD 444.

CONCURRENT SENTENCES—It has been held under the old section that a Magistrate cannot direct that the subsequent sentence shall run concurrently with the previous sentence, because a Magistrate can pass concurrent sentences only when the offences are tried at one and the same trial (See sec 35)—20 C W N 1300, Ratanlal 532, Ratanlal 18, 2 BOM L R 111, 4 BOM L R 876, 1912 M W N 396, 2 Weir 453, 19 A L J 310, 11 A L J 263, 1912 P L R 20, 2 S L R 23, 15 C P L R 57, 4 L B R 147, even where the trials are held on the same day, the Magistrate cannot make the sentences in the two trials concurrent—1894 P R 12. But now the amendment made at the end of para 1 of this section will allow the subsequent sentence to run concurrently with the previous one.

'AT THE EXPIRATION OF'—If one sentence is reversed—A person was convicted by a Magistrate and sentenced to 2 years' imprisonment, and a month afterwards he was sentenced to three years imprisonment by the Court of Session, which directed the sentence to take effect on the expiration of the sentence passed by the Magistrate. On appeal the conviction and sentence passed by the Magistrate were set aside. It was held that the sentence by the Sessions Court must be deemed to have commenced from the time it was ordered to commence viz after the expiration of the Magistrate's sentence whether by reversal or completion of the punishment, and not before—Ratanlal 139, Ratanlal 723. But in 2 Weir 150 under similar circumstances it was held that the imprisonment already undergone must be reckoned as imprisonment under the sentence in the conviction which was not reversed. So also the Calcutta High Court lays down "Where a prisoner has been committed to jail under two separate warrants the

(4 A) *The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law, which restricts the liberty of any person or imposes any liability upon him or his property*

(5) Nothing herein contained shall be deemed to interfere with the right of His Majesty or of the Governor-General when such right is delegated to him to grant pardons, reprieves, respite or remissions of punishment

(5 1) *Where a conditional pardon is granted by His Majesty or, in virtue of any powers delegated to him, by the Governor-General any condition thereby imposed, of whatever nature shall be deemed to have been imposed by sentence of a competent Court under this Code and shall be enforceable accordingly*

(6) The Governor-General in Council and the Local Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with

CHANGE —The italicised words and subsections (4 A) and (5 1) have been added by section 107 of the Criminal Procedure Code Amendment Act 1923

SCOPE OF SECTION —This section applies only to persons sentenced to imprisonment and not to persons upon whom a conditional pardon has been tendered under section 337—11 ALL 79

CASES —In cases of murder the Judge may report any extenuating circumstances calling for a mitigation of the punishment to the Government and the Government may thereupon take such action under this section as it thinks proper—23 CAL 604 10 BOM 512

In these cases the accused committed murder without any apparent sane motive and was suffering from mental derangement of some sort and the High Court holding that the accused was not entitled to be acquitted under section 84 I P C, recommended the case to the Local Government under this section to be dealt with in such manner as it thought fit

PROCEDURE —All recommendations for remission or suspension of a sentence made under section 401 by an officer of any subordinate court to the Local Government in regard to a convict whose case has

400. When a sentence has been fully executed the officer executing it shall return the warrant to the Court from which it issued with an endorsement under his hand certifying the manner in which the sentence has been executed

Return of warrant on execution of sentence

CHAPTER XXIX

OF SUSPENSIONS, REMISSIONS AND COMMUTATIONS OF SENTENCES

401. (1) When any person has been sentenced to punishment for an offence, the Governor General in Council or the Local Government may at any time without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced

Power to suspend or remit sentences

(2) Whenever an application is made to the Governor General in Council or the Local Government for the suspension or remission of a sentence, the Governor General in Council or the Local Government as the case may be may require the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused together with his reasons for such opinion *and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists*

(3) If any condition on which a sentence has been suspended or remitted is in the opinion of the Governor General in Council or of the Local Government, as the case may be not fulfilled the Governor General in Council or the Local Government may cancel the suspension or remission and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police-officer without warrant and remanded to undergo the unexpired portion of the sentence

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted or one independent of his will

(6) The Governor-General in Council and the Local Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with.

CHANGE — The italicised words and subsections (4 A) and (5 A) have been added to section 107 of the Criminal Procedure Code Amendment Act 1923.

SCOPE OF SECTION — This section applies only to persons sentenced to imprisonment and not to persons upon whom a conditional pardon has been tendered under section 337—11 A.L.J. 79.

CASES — In cases of murder the Judge may report any extenuating circumstances calling for a mitigation of the punishment to the Government and the Government may thereupon take such action under this section as it thinks proper—23 C.A.W. 601 10 BOM 512.

In these cases the accused committed murder without any apparent sane motive, and was suffering from mental derangement of some sort and the High Court holding that the accused was not entitled to be acquitted under section 81 I.P.C., recommended the case to the Local Government under this section, to be dealt with in such manner as it thought fit.

PROCEDURE — All recommendations for remission or suspension of a sentence made under section 401 by an officer of any subordinate court to the Local Government, in regard to a convict whose case has

been before the High Court on appeal, shall be made through the High Court—*Cal G R & C. O.*, p 40

CERTIFIED COPY OF RECORD —The original record need not be sent. "Objection has been taken to the inconvenience of this, and we think that it will be sufficient to require a certified copy of the record to be furnished"—*Report of the Select Committee of 1916*

"Such record thereof as exists" —"It is well known that in the case of proceedings in a High Court the Judges object to their notes being treated as part of the record, and we have therefore referred in our proposed amendment of section 401 (2) to "a certified copy of the record of the trial, or of such record thereof as exists" We think in cases where it is necessary, in considering a petition for mercy, for Government to know, as it frequently may be, the nature of the evidence given at a trial in a High Court, we can safely trust to the courtesy of High Court Judges to furnish a copy of their notes"—*Report of the Select Committee of 1916*

SUB-SECTIONS (4-A) AND (5-A) —"The new clause 4-A is intended to make it clear that the power to remit sentences conferred by section 401 can be exercised in the case of orders of a penal nature, e.g., orders under section 565 of the Code. The object of the new clause 5-A is to enable any condition upon which a pardon has been granted by His Majesty or by the Governor General when such power has been delegated to him, to be enforced in the same way as a sentence of a Court"—*Statement of Objects and Reasons (1921)*

In sub-section (4-A), the word 'law' has been used instead of the more common word 'Act' to make it clear that this section applies to the case of persons sentenced by tribunals constituted by Regulations and Ordinances—*Report of the Joint Committee (1922)*

SUB-SECTION (5) —"*Or of the Governor-General*" —"We have made a formal amendment in this sub-section in view of the special delegation to the present Governor-General of His Majesty's prerogative of pardon"—*Report of the Select Committee of 1916.*

402. (1) The Governor-General in Council or the Local Government may, without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it:—

death, transportation, penal servitude, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine.

(2) Nothing in this section shall affect the provisions of section 4 of the Indian Penal Code.

Section 421 has been substituted in section 403 of the Criminal Procedure Code. Accordingly, Act 127 of 1938 has been expressed as: "The substitution of section 421 with section 403 of the Indian Penal Code as it then existed was to be read as if inserted at the end of section 421A."

CHAPTER XXX

ON TRIALS, ACQUITTALS OR CONVICTIONS

403. (1) A person who has once been tried by a Court competent to try him for an offence and acquitted or convicted of such offence shall while such conviction or acquittal remains in force,

not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under sec. 237.

(2) A person acquitted or convicted of an offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 237, sub-section (1).

(3) A person convicted of any offence constituted by any act and its consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897, or section 188 of this Code.

Explanation —The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused on any entry made upon a charge under section 273, is not an acquittal for the purposes of this section

ILLUSTRATIONS

(a) A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with theft as a servant, or upon the same facts with theft simply, or with criminal breach of trust

(b) A is tried upon a charge of murder and acquitted. There is no charge of robbery, but it appears from the facts that A committed robbery at the time when the murder was committed, he may afterwards be charged with, and tried for, robbery

(c) A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide

(d) A is charged before the Court of Session and convicted of the culpable homicide of B. A may not afterwards be tried on the same facts for the murder of B

(e) A is charged by a Magistrate of the first class with, and convicted by him of, voluntarily causing hurt to B. A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts unless the case comes within paragraph 3 of the section

(f) A is charged by a Magistrate of the second class with, and convicted by him of, theft of property from the person of B. A may be subsequently charged with, and tried for, robbery on the same facts

(g) A, B and C are charged by a Magistrate of the first class with, and convicted by him of, robbing D. A, B and C may afterwards be charged with, and tried for, dacoity on the same facts

PRINCIPLE —This section is an amplification of the well known maxim of law '*nemo debet bis vexari*'. This principle does not rest on any doctrine of estoppel but embodies the well established rule of common law that a man may not be put twice in peril for the same offence—29 MAD 126 (F B). Where an offence has already been the subject of judicial investigation and adjudication and there has been an acquittal the acquittal is conclusive and it would be a very

dangerous principle to adopt to regard a judgment of not guilty as not fully establishing the innocence of the accused—*Rex v. Plummer*, [1902] 2 K. B. 339, followed in 38 CAL. 559 (at p. 578)

'A PERSON' —*Person not tried at the first trial* —This section bars a subsequent trial of the same person who had once been placed on trial for the same offence. But does it bar the trial of persons who had not been placed in the first trial but who were implicated in the offence committed by the accused who was placed on the first trial? According to 7 C. W. N. 493, the principle of this section extends to such persons and therefore where three out of five persons concerned in the same offence were at first placed on trial and acquitted, a subsequent trial of the remaining two persons for the abetment of the offence was barred by this section. But this ruling has been disapproved of in almost all the other cases. Thus where on a complaint charging a number of persons with several offences, only three were sent up for trial, and they were acquitted on the ground that the prosecution case was untrue, and subsequently other persons alleged to be implicated in the same offences were sent up, it was held (dissenting from 7 C. W. N. 193) that the trial of these persons was not barred under this section—37 CAL. 680. So also, where in a previous trial, two persons were acquitted by the jury of the offences of conspiring with a third person who was not placed on trial, it was held that the acquittal of those two persons did not operate as a bar to the trial of the third person—41 CAL. 754. See also 10 C. W. N. 1031.

Person absent in the first trial —Where a complaint against two accused was dismissed, owing to the absence of the complainant, and one of the accused who attended Court to answer the charge was acquitted, the acquittal will operate in favour of the other accused also who was absent, and will bar fresh proceedings against him on the same facts—4 C. W. N. 346. In this case the accused was placed on trial, though he was absent on the day of hearing. But where out of three persons concerned in an offence, two persons were found and the third absconded and the two were placed on trial and convicted, the case of the third, when found, should be heard and decided altogether irrespective of the fact that there had been a previous trial and conviction of the other accused, the second trial is not barred—36 ALL. 168.

"TRIED" —There must be a previous trial of the accused to bar a subsequent trial under this section. Where a complaint of a non-cognizable offence was made before the Police, and the Magistrate

did not (and could not) take cognizance of that offence, there can not be said to have been a trial of that offence, and consequently a subsequent complaint of that offence is not barred by this section—5 BOM 465

So also, where a Magistrate after taking cognizance of an offence dismisses the complaint under section 203, there cannot be said to have been a *trial* of the accused, and it is open to the Magistrate to rehear the complaint—29 MAD 126 (It is interesting to read the dissentient judgment of Subrahmanya Ayyar J in this case)

So also, where no process had been issued against the accused, and no proceedings taken against them but the Magistrate simply permitted the withdrawal of charge sheets against the accused it was held that the withdrawal of the charge-sheets was no bar to fresh proceedings being taken against the accused by drawing fresh charge-sheets—36 MAD 315

But it is not necessary that there should be a full trial and an acquittal or conviction on the merits. Where the accused appears and answers to a charge, he is said to be *tried*, although the case may be dismissed for non appearance of the complainant. He is not liable to be tried again for the same offence upon the same facts upon the complaint of another person—2 Weir 457 34 MAD 253. The words “who has once been tried” mean against whom proceedings have been commenced in Court i.e. against whom the Court has taken cognizance of the offence and issued process. Therefore where the Police filed a charge sheet against a certain person before a Magistrate and a summons was issued but before it was served the Public Prosecutor with the consent of the Court withdrew from the prosecution under sec 191, and the accused was acquitted it was held that the accused must be said to have been ‘tried and acquitted’ within the meaning of this section, and the acquittal bars a further trial for the same offence—10 MAD 970. But in 10 MAD 977 (Note) it was held that the non-appearance of a complainant on the first day of hearing and consequent acquittal of the accused under sec 217 do not bar a retrial, because the accused cannot be said to have been ‘tried’ on the first complaint. The trial of an accused in a summons case cannot be said to begin until the particulars of the offence are stated to the accused under sec 212, and where there is nothing to state that any trial was commenced on the first complaint, sec 403 would not bar the Court from taking cognizance on the second complaint.

First trial is the first trial—If there is a gross irregularity or illegality in a trial such a trial will not operate as a bar to retrial of the accused for the same offence—13 W R 42 But if the trial is regularly conducted it will bar a second trial, even though the second Court considers that the former conviction or acquittal was unwarranted by the evidence given in the first trial—7 W R 15 Even if the order of acquittal was passed in the first trial under a misapprehension of law it would still operate as a bar to a second trial—4 S L R 174 The absence of a charge does not make the trial illegal Where the trial had otherwise been regularly conducted even though no formal charge had been framed the order of acquittal would bar subsequent proceedings—3 M L J 121

But where the first trial was conducted without any complaint at all the trial was void *ab initio* and therefore a second trial is not barred—19 Cr L J 796 (O D D)

CONVICTION OR ACQUITTAL—It *not amounts to acquittal*—It is not necessary that there should be an acquittal on the merits; therefore the withdrawal of remaining charges under section 240, on conviction of one of several charges has the effect of acquittal, and bars a fresh trial on the same facts—19 W R 55 The non-appearance of the complainant in a summons case has the effect of acquitting the accused (see 247) and he cannot be tried again for the same offence—see 2 Weir 457, 1 C W N 316, 2 P L T 170, 40 MAD 976 Contra—40 MAD 977 (Note) cited above The withdrawal of a summons-case by the complainant operates as an acquittal of the accused A compromise under sec 315 has the effect of acquittal—Ratanlal 319 1911 P R 29 The withdrawal of the Public Prosecutor from the case under section 191 (b) has the effect of acquitting the accused and will bar a fresh trial—12 MAD 35, 9 N L R 26, 40 MAD 976 23 Cr L J 305 (Sind) The dismissal of a summons-case amounts to an acquittal—1917 P W B 14 An order of acquittal under sec 238 cannot be treated as an order of discharge, it is one of acquittal and bars a second trial of the same offence on the same facts—43 MAD 330

But a wrong order of acquittal will not bar a subsequent trial under this section If a Magistrate tries a warrant case as a summons-case and acquits the accused without framing a charge, such an order of acquittal will be treated as one of *discharge* only, and cannot operate as a bar to a re-trial—6 A W N 260, 8 A W N 96 If in a warrant case, before the charge is drawn up and the accused

called upon to plead to it, the Magistrate erroneously acquits the accused, the acquittal amounts only to a discharge and does not bar a re-trial—6 W R 13 (But if the trial has been otherwise regularly conducted, the absence of a formal charge will not convert the order of acquittal into one of discharge, and the order of acquittal will bar a re-trial—3 ALL 129) Where a preliminary charge sheet was laid by the Police before the Magistrate under sec 107, against several persons, but the Police intending to withdraw it in order that they might present a fresh charge sheet against some only of those included in it the Magistrate permitted the withdrawal and endorsed on the charge-sheet that the accused were acquitted, it was held that such an endorsement was illegal, because neither an order of discharge nor one of acquittal could be made in a case where no process has been issued against the accused, and therefore the Magistrate's order was no bar to fresh proceedings being taken on a second charge-sheet—36 MAD 315

On the other hand where a person who ought to have been *acquitted*, is erroneously ordered to be *discharged* only, the order of discharge will be treated as one of acquittal and will bar a retrial. Thus where a Public Prosecutor withdraws from the case under sec 191, after the frame of charge, the accused ought to be acquitted and not discharged, if however he is ordered to be discharged, he will be deemed to have been acquitted and a subsequent trial and conviction on the same facts is illegal and will be set aside—12 MAD 35 So also where in a warrant case the accused has pleaded to a charge, the Magistrate can either convict or acquit him, his order dismissing the case will be one of acquittal and not of discharge of accused—5 C L R 259, 1911 P R 29

Burden of proof—The burden of proof of previous conviction or acquittal is upon the party setting it up—9 A W N 8

COURT OF COMPETENT JURISDICTION—The Council of Elders established under the Punjab Frontier Regulation (IV of 1887) is a Court of competent jurisdiction, for the purposes of this section, and a person convicted by such Council cannot be retried on the same facts—1891 P R 30

It is necessary to a plea of *autre fois acquit* that the first Court should have had competent jurisdiction to try the offence and therefore the conviction or acquittal of an accused by a Court not having jurisdiction is no bar to the institution of fresh proceedings against the accused on the same facts—2 W R 9 6 W R 13 A trial by a

Court not having jurisdiction is void *ab initio*, and the accused if acquitted is liable to be retried. It is not necessary to get the trial set aside before the accused can be retried—8 BOM 307

Where a conviction by a Magistrate who had no jurisdiction to try the offence is set aside by the Appellate Court and that Court discharges the accused without ordering a retrial, this section does not bar fresh proceedings being taken in the proper Court—29 CAL 412, 39 ALL 293

Where the law requires a previous sanction (now abolished) or complaint under sec 195 before a charge can be entertained by a Court that Court is not a Court of competent jurisdiction until the sanction has been obtained or the complaint has been made—37 ALL 107, 22 BOM 711 40 BOM 97. Therefore where the accused was acquitted in the previous trial for the offence of forgery and cheating a Sub Registrar for which no complaint was made under sec 195 before prosecution the acquittal did not bar a subsequent trial for aiding and abetting cheating held after a formal complaint made by the Sub Registrar. The previous trial was not a trial by a Court of competent jurisdiction since no complaint under sec 195 was made before trial—37 ALL 107 19 A L J 813. But in 36 MAD 308 it was held that the sanction or complaint under sec 195 is not a condition of the competency of the tribunal but is only a condition precedent for the institution of the proceedings before the tribunal.

WHILE SUCH CONVICTION OR ACQUITTAL REMAINS IN FORCE—This means, 'as long as such conviction or acquittal is not set aside by a Court of Appeal or Revision. If the conviction or acquittal is set aside by the Appellate Court the result will be that the previous trial is annulled and the prisoner may be again put upon his trial—7 W R 2 7 W R 3

So long as the conviction or acquittal is not set aside it will bar a second trial even though the second Court considers that the acquittal in the first trial is not warranted by the evidence produced in the first trial—7 W R 15

'RETRIAL'—Where the jury is discharged under section 305 the accused may be retried under section 308 such a retrial is not barred by this section. In such a case the accused is being tried on the original indictment and not 'retried'. The duty of the Court is to continue the trial of the accused before another jury, and the process may continue without the accused being 'tried again' under section 403—41 CAL 102. (Moreover in such a case as where the

jury is discharged under section 305, the accused is neither convicted nor acquitted, and therefore his retrial is not barred under this section)

An appeal or a revision is not a retrial, but a continuation of the same trial—23 CAL 975, 9 ALL 134, and therefore the Court of Appeal can convict the accused on a charge on which he has been acquitted or order a retrial on the same charge—22 CAL 377

"FOR THE SAME OFFENCE" —The former conviction or acquittal is a bar to a second trial, if the offence is the same. Thus a person charged with and acquitted of an offence under the Abkari Law (Bombay Act V of 1878) cannot subsequently be tried for the same offence—10 BOM 181 (The 'offence' under this section is not restricted to offences under the Indian Penal Code) If the offences be different and based on different facts though based on the same evidence the previous trial will not bar a second trial. Thus where the prisoner was charged with the forging of a certain document in the first trial and acquitted, he can afterwards be tried for the forging of some other document with regard to which evidence was given at the previous trial. It would be no defence in the second trial that evidence was given in the first trial which if believed would have ended in his conviction for both the offences—7 W R 15 See sub section (2)

Where a person has been tried for some offence and acquitted he cannot be subsequently charged with *conspiracy* of which that offence is alleged to form a part—38 CAL 579

Continuing offence —A person who has once been tried for building a house without the sanction of the Municipal Committee and acquitted cannot be retried for the same offence simply on the ground that the house continues to stand and thus constitutes a continuing offence. The previous acquittal will bar a retrial—1917 P W R 17

Second complaint by different person —A person once convicted of an offence cannot be tried again for the same offence and on the same facts, even though the complainant in the second case is not the same person as the complainant in the first case. Thus the accused assaulted several persons A B etc. At first A filed a complaint against the accused and they were convicted under section 323 I P C. Afterward B filed a similar complaint against the same accused on the same facts. Held that the second trial was barred—18 A I J 65

"SAME FACTS" —A Court ought not to decide that a charge pending trial before him is barred under this section without an investigation of the facts put forward on behalf of the complainant—23 C W N 541, 21 Cr L J 67 (CA). Where the complainant charges the accused before the Magistrate with a certain offence, and a preliminary objection is put forward on behalf of the accused that he had been previously tried on the same facts in another Court and acquitted, it is the duty of the Magistrate to hear the evidence and ascertain what are the facts in the two cases in order to determine whether the facts in the present case are the same as those in the previous case—21 C W N 599

TRIAL FOR DIFFERENT OFFENCE UPON THE SAME FACTS —The protection offered by this section extends to different offences only when they are based on the same facts and fall within the provisions of sec 236 or sec 237—1 BOM L R 15. Where a person has been tried and convicted or acquitted for an offence arising out of a particular set of facts, he cannot, while such conviction or acquittal remains in force be again tried in respect of any offence based on the same facts unless the case can be brought under one or other of the specific exceptions to the rule provided by sub-sections (2) to (4)—9 N L R 26

Examples —(1) A trial for the offence of theft of an animal bars a subsequent trial for the offence of mischief for subsequently killing that animal—1 Weir 497

(2) Similarly, where a person was tried for the offence of mischief, and was acquitted on the ground that the tree in respect of which the mischief was alleged to have been committed was his own property, he cannot afterwards be tried for the offence of theft of the same tree, on the same facts—8 MAD 296

(3) A person acquitted of using criminal force cannot be tried for hurt on the same facts—16 W R 3

(4) The conviction and sentence of a person under sec 52 of Act VI of 1898 (formerly sec 5 of Act XVII of 1854) for fraudulently secreting a postal letter would bar a subsequent trial under the same section of having fraudulently made away with the same letter on the same occasion—1 M H C R 83

(5) Where a person is convicted on a charge under sec 411 I P C, of having been dishonestly in possession of property knowing it to be stolen he cannot be subsequently convicted under sec 414 I. P. C. of

voluntarily assisting in concealing other property stolen on the same occasion from the same person—28 ALL 313

(6) Where a person has been tried and acquitted on a charge under sec 211 I P C, he can not be tried again on a charge under sec 182 I P C—36 MAD 308

(7) A person charged under section 324 I P C cannot, if the offence has been compounded, be again tried on the same facts for an offence under sec 323 I P C, if the composition which has the effect of an acquittal is still in force—Ratanlal 519

(8) Where a Magistrate issued processes against and summoned the accused for one of several offences alleged against them, and acquitted them of the offence for which they were summoned, no fresh processes could be issued against them either in respect of the offence already tried or in respect of the other offences—2 C L J 622

(9) Where the prisoner was at first tried under sec 498 I P C for having enticed away a married woman from her husband, and was acquitted on the ground that the whole case was fabricated, and the prisoner was next charged and convicted under sec 353 I P C of having kidnapped two infants of the woman, who were with her when she left the house, it was held that the second trial was illegal because so long as the acquittal under sec 498 I P C remained in force, the second Court was bound to take it as proved that the accused did not entice away the woman, and therefore the offence under sec 353 alleged to have been committed while the prisoner enticed away the woman is disproved by the above finding of fact—1911 P L R 56

(10) A person acquitted of the charge of cheating cannot be tried again for the offence of falsification of accounts, upon the same facts—20 Cr L J 667 (Patna)

(11) The accused was tried under sec 363 I P C and acquitted. The Sessions Judge directed further inquiry to be made to ascertain whether offences under secs 366 and 368 I P C were committed. It was held that the order directing further inquiry was illegal in as much as kidnapping (sec 363 I P C) is an essential element in offences under secs 366 368 I P C, and the accused having been already acquitted of that offence he could not be put on trial again for offences under sec 366 368 I P C—20 Cr L J 726 (Patna)

(12) An acquittal of the prisoner on charges under secs 380 381 I P C for being found in possession of a quantity of opium bars

subsequent proceedings in respect of the same act under sec 51A of the Calcutta Police Act—45 CAL 727

(13) Where the accused was acquitted of a charge of unlawful assembly with the common object of assaulting a person, the District Magistrate is not justified in ordering a further inquiry into the offence of hurt on the same facts, when the order of acquittal remains in force—5 C W N 72

(14) Where a person was at first charged with kidnapping a minor girl, under section 363 I P C but the trying Magistrate finding that the girl was not under sixteen acquitted the accused a second trial on the same facts for the offence of abducting the girl in order to confine her secretly (Section 365 I P C) was barred. The accused in the first trial might have been charged in the alternative with the second offence under section 237 of this Code—24 C W N 856

(15) If a person charged under section 338 I P C with having caused grievous hurt by rashly driving a motor car is acquitted because it is not proved that he was driving the car he cannot be subsequently tried under section 16 of the Motor Vehicles Act for the offence of driving the car without a license—2 P L T 31

(16) Where an accused was tried under section 408 I P Code for criminal breach of trust in respect of three sums of money alleged to have been dishonestly misappropriated and it was part of the prosecution case at the trial that he had made three false entries to conceal the misappropriation, and he was acquitted by the jury but was subsequently charged on the same evidence under section 477A (falsification of accounts) of the I P C in respect of the said three entries it was held that he should not on the same facts be tried again for what were virtually the same offences charged in a different form—49 CAL 924

But the previous trial for an offence founded on a particular set of facts does not bar a second trial for a different offence based on different facts. Thus the previous acquittal on a charge of theft does not bar a subsequent trial for the offence of receiving stolen property, as the latter offence was supported by certain additional facts ascertained subsequent to the first trial—10 C W N 1031. The previous trial for forging a certain document does not bar a subsequent trial for forging another document—7 W R 15

‘For which a charge might have been framed’—Thus section protects a person against a trial for ‘any other offence for which a

But a person who has been tried and acquitted of offences under sections 201 and 202 I P C cannot be tried again for an offence under section 176 I P C based on the same facts. Such a case does not come under section 235 (1) but under section 235 (2), and therefore subsection (2) of this section does not apply. It falls under subsection (1) of this section, and the second trial is barred—10 C W N 518

SUBSECTION (3) —‘*Constituted a different offence*’—The new facts or circumstances must be such as to indicate a different kind of offence of which there could be no conviction at the first trial. It is not enough to show merely circumstances of aggravation or serious consequences of the offence which have occurred since the first trial. Where a person was convicted under section 31 of the Rangoon Police Act 1899 for being in possession of an article supposed to be stolen he cannot be again tried subsequently for an offence under section 457 I P C merely on the ground that the owner of the article is traced and some further evidence is available—8 BUR L T 129. The new evidence must constitute a different kind of offence of which he could not have been tried at the first trial.

‘*Were not known to the Court*’—The new facts or consequences must have occurred since the conviction or acquittal at the first trial. Thus where a person was at first tried for causing grievous hurt and convicted and after the conviction the injured man died, it was held that the accused could be again tried for the offence of culpable homicide, since the consequence of hurt (i.e. the death) did not take place until after the first trial—1901 P R 3, 36 ALL 1. So also where a person was acquitted of an offence under the Bombay City Municipal Act, for proceeding to erect certain balconies in contravention of the Act, he can be subsequently tried for failure to remove these balconies after notice, because the offence of non removal of these balconies could not have been committed until the notice to remove them was served, and the service was made only after the previous acquittal—4 BOM L R 675.

But if the new facts or consequences were known to the Court at the time of the first trial a second trial for an offence constituted by these new facts would be barred. Thus, where the prisoner was at first tried for causing hurt and before the trial and conviction for hurt the injured man died and the fact was known to the Court which convicted the prisoner for hurt he could not again be tried for homicide.

SUBSECTION (4) — '*Was not competent*' — The words '*not competent to try*' mean '*had no jurisdiction to try*'—24 MAD 641 If a person has been acquitted or convicted of an offence but the same facts disclose an offence which could not be tried by the same Magistrate, then the previous acquittal or conviction is no bar to further proceedings for a more serious offence—18 Cr L J 643 (MAD) Therefore the trial of the accused for an offence of voluntarily causing grievous hurt by a Magistrate does not bar the trial of the accused for attempt to murder on the same facts, as the previous trial was by a Court not competent to try the latter offence—7 N W P H C R 371 Where a Magistrate convicted the accused of rioting a fresh complaint of dacoity based on the same facts was not barred, since the Magistrate who tried the offence of rioting was not competent to try the offence of dacoity—7 MAD 557

Similarly, a previous conviction for the offence of causing hurt tried before a Magistrate does not bar a subsequent trial of an offence by the Sessions Judge under section 301, upon the same facts—5 BOM L R 125, 43 MAD 330 A conviction by a Magistrate for a minor offence does not bar a subsequent trial for murder—Ratanlal 337, 1912 P R 7 A person acquitted or convicted by a Magistrate under section 465 I P C may on the same facts be tried by a Court of Session under section 467 on the allegation that the document said to have been forged was a valuable security—19 Cr L J 388 (CAL) When on a complaint made under sections 409 and 477A I P C, a second class Magistrate proceeded to deal with the case as one under section 408 I P C and acquitted the accused, and the complainant afterwards presented a further complaint to the District Magistrate praying for the trial of the accused under sections 409 and 477 I P C it was held that the District Magistrate was competent to take cognizance of the second complaint as the second class Magistrate who dealt with the first complaint was not empowered to commit accused persons for trial to the Court of Session—23 C W N 518 A person convicted by a village Headman under the Burma Village Act, for assault can be tried subsequently by a Magistrate for the causing of hurt upon the same facts, the village Headman not being competent to try the offence of causing hurt—(1919) U B R 3rd Qr 135

If however the Court (Sessions Judge) which tried the previous offence was also competent to try the subsequent offence, the trial of the latter offence is barred by this section, and the fact that the

first offence was triable with the aid of assessors and the second offence was triable by a jury, is immaterial—24 MAD 611 This subsection refers to the competency of the tribunal to try the offence—36 MAD, 308, and not to the nature of the offence, *i.e.*, as to whether it is triable by jury or assessors

The absence of a proper complaint under section 199 of the Code renders the Court 'incompetent' to try the offence Where a Magistrate dismissed a complaint of an offence under section 498 I P C on the ground that the complaint was not made by the person specified under section 199, and acquitted the accused, it was held that the order of acquittal amounted to a finding that the Court was 'not competent to try the offence' in the absence of complaint by the proper person, and therefore a fresh complaint instituted by the proper person (the husband of the woman) was not barred under this section—31 ALL 317 Similarly where the accused was at first tried under sections 366, 368 and 376 I P C and acquitted, and subsequently the husband of the woman preferred a complaint under section 498 I P C, on the same facts and the accused was tried and convicted, it was held that the second conviction was not illegal, since the previous Court was not competent to try the accused under section 498 in the absence of a complaint by the husband—17 BOM L R 678

As to the effect of absence of complaint under section 193, see notes under subsection (1) above under heading 'Court of competent jurisdiction'

EXPLANATION —*That orders do not amount to acquittal* —(1) The dismissal of a complaint under section 203 is not an order of acquittal within the meaning of this section and therefore upon such dismissal, it is competent for the Magistrate to entertain a fresh complaint or rehear the original complaint see notes under sec 203

(2) An order under section 249 stopping the proceedings of a trial has been specifically excluded by the explanation from being an order of acquittal, and therefore it does not bar fresh proceedings—1913 P. R. 9, 1 B L R A C I

(3) A stay of trial under section 210 has not the effect of acquittal of the accused Where a Magistrate trying an accused for offences under sections 193 and 201 I P C convicted the accused under the former section, but with regard to the latter the Magistrate thinking that the facts constituted some other offences, ordered the papers to be placed before the District Magistrate, and later on the accused was

again put on trial under section 201 I P C , it was held that the first disposal did not amount to an acquittal but only to a stay of trial under section 240, and the subsequent trial was not barred by this section—9 A W N 8

(4) Where the prisoner is released by the Appellate Court on the ground of illegal or irregular procedure in the Lower Court, the release will be no bar to the retrial of the accused for the same offence—13 W R 42

Discharge of accused —Sec 403 applies only to cases of acquittal or conviction, and has no application to a case in which the accused person has been *discharged*—17 A L J 867

It is competent for the Magistrate to rehear a complaint after the accused is discharged under sec 253 or 259 See notes under those sections An order of discharge under sec 333 on a *nolle prosequi* is no bar to fresh proceedings—16 C W N 983 When a person is discharged under sec 119 he is merely permitted to depart such a discharge is not an acquittal and fresh proceedings may be taken against the accused See 13 MAD 85 Where a conviction by a Magistrate who had no jurisdiction to try the case is set aside on appeal and the Appellate Court without ordering a retrial, merely discharges the accused this section does not bar a fresh trial by a competent Magistrate—29 CAL 412, 3 MAD 48

But although there is nothing in law against the entertainment of a second complaint on the same facts against a person who has been discharged, yet, unless very strong grounds are shown (i.e., discovery of new facts, etc.), a person who has been charged once and discharged ought not to be harassed on the same charge—18 Cr L J 329 (MAD).

When an order of discharge is passed no order under sec 436 or 437 is necessary for the institution of fresh proceedings—1 W R 11, 3 W R 21 8 W R 61 9 W R 15 14 W R 65, 18 W R 39, 20 W R 46, 25 W R 31 1 CAL 282 2 CAL 405, 4 CAL 16, 10 CAL 268 28 CAL 211 29 CAL 726 4 N W P H C R 23, 29 ALL 7 1 BOM 64 2 BOM 534 10 BOM 131 4 M H C R APP 8 28 MAD 310 32 MAD 220 17 O C 273 10 BUR L R 1

MISCELLANEOUS —*Loss of record* —Where in an appeal from a conviction and sentence of murder it was discovered that the entire record of the proceedings was lost the High Court ordered a retrial on the assurance of the accused's counsel that no legal plea in bar of a new trial will be put in by him or his client—9 A W N 55

may appeal to the Court to which appeals ordinarily lie from the sentences of the former Court

'Court to which appeals ordinarily lie means Court to which appeals lie in the majority of cases even though in a particular instance the appeal may lie to another Court—11 BOM 438

406. Any person who has been ordered under S 118 to give security for keeping the peace or for good behaviour may appeal against such order—

(a) If made by a Presidency Magistrate to the High Court

(b) If made by any other Magistrate, to the Court of Session

Provided that the local Government may by notification in the local official Gazette, direct that in any district specified in the notification appeals from such orders made by a Magistrate other than the District Magistrate or a Presidency Magistrate shall lie to the District Magistrate and not to the Court of Session

Provided further that nothing in this section shall apply to persons the proceedings against whom are laid before a Sessions Judge in accordance with the provisions of sub-section (2) or sub-section (3) of S 123

CHANGE—This section has been redrafted by the Criminal Procedure Code Amendment Act 1923. The old section stood thus—

‘406 Any person ordered by a Magistrate other than the District Magistrate or a Presidency Magistrate to give security for good behaviour under section 118 may appeal to the District Magistrate

The main changes introduced are—(1) Under the old section an appeal lay from an order directing security to *keep the peace*—27 ALL 231 ILA L J 208 35 ALL 103 11 BOM L R 740. These cases are now overruled and an appeal is now allowed from such order. (2) Under the old law there was no appeal against an order of a District Magistrate directing security for good behaviour—18 A W N 127, under the present law an appeal lies from the order of any Magistrate. (3) Under the old law the appeal lay to the District Magistrate, under the present law, it will ordinarily lie to the Court of Session.

SCOTT. This section applies to the order requiring security under sec. 118, but not to detaining security. Keep the pages in for sec. 118 and 119, especially 2 West 66.

SCOTT. Under the old law an appeal from an order passed by a Magistrate lay to the District Magistrate, lay to the Court of the District Magistrates—2 C. W. N. 33, 1 S. L. R. 68. From an appeal from the order of an Assistant District Magistrate lay to the District Magistrate—25 C. W. N. 33. Under the present law the appeal will lie to the Sessions Court only under a special reference; under the first provision the appeal will lie to the District Magistrate.

SCOTT. This provision expressly lays down that the provisions referred to in sec. 124 of the Code apply under sec. 124 and operates as a bar to an appeal. The reason is well founded since the Sessions Judge is seized of the case on the reference, any appeal to him is unnecessary. *reilly*, if an appeal is allowed to the Court of the District Magistrate under the first provision there may be two different decisions, one by the District Magistrate on appeal and another by the Sessions Judge on the reference. The principle of this provision was recognized under the old law—see 23 Cr. L. J. 151 (C.A.).

When the order of the Subdivisional Magistrate under sec. 124 is referred to the Sessions Judge the order passed by the Sessions Court becomes the operative order and no appeal lies therefrom to the District Magistrate as it were from the order of the Subdivisional Magistrate—1. H. R. 1893 (P.O.) 181. When a reference has been made to the Sessions Judge under sec. 124 and disposed of, no appeal lies to the District Magistrate—1900 P. R. 15, nor even to the High Court—9 CAL. 878.

406A. Any person aggrieved by

Appeal from order refusing to accept or to getting a surety
an order refusing to accept or rejecting a surety under S. 122 may appeal against such order—

- (a) if made by a Presidency Magistrate to the High Court,
- (b) if made by the District Magistrate, to the Court of Session, or
- (c) if made by a Magistrate other than the District Magistrate, to the District Magistrate.

This section has been added by section 110 of the Criminal Procedure Code Amendment Act, 1923. "We think that there should

passed under S 380 by a Magistrate of the first class, may appeal to the Court of Session

Provided as follows —

(a) *omitted*,

(b) when in any case an Assistant Sessions Judge or a Magistrate specially empowered under S 30 passes any sentence of imprisonment for a term exceeding four years, or any sentence of transportation, the appeal of *all or any of the accused convicted at such trial* shall lie to the High Court,

(c) when any person is convicted by a Magistrate of an offence under S 124 A of the Indian Penal Code, the appeal shall lie to the High Court

CHANGE —The italicised words have been added by section 112 of the Criminal Procedure Code Amendment Act, 1923. Clause (a) which referred to European British Subjects has been omitted by the Criminal Law Amendment Act 1923

CONVICTED —A person who is convicted but on whom no sentence is passed the person being released on probation under section 362 is said to be convicted within the meaning of this section and can appeal—1901 P R 24 1917 P R 20

See also 40 BOM 38 and 29 MAD 317 cited under section 407

SINCE UNDER SECTION 319 —When a case is referred to a District Magistrate under section 319, the fact that he is also invested with special powers under section 30 will not empower him to pass a sentence of five years imprisonment, such a sentence is *ultra vires* having regard to the last clause of section 319. The appeal in such a case will lie to the Court of Session and not to the High Court under proviso (d)—1 I B II 53

SENTENCE UNDER SECTION 380 —Where proceedings were submitted under section 380 by a second class Magistrate to a first class Magistrate in order that the accused might be dealt with under section 362, and the latter convicted and sentenced the accused, and the question arose under the old law as to whether an appeal lay to the Sessions Judge or to the District Magistrate it was held that the sentence passed by the first class Magistrate under section 380 in a case submitted to him was unquestionably a sentence passed by such Magistrate and the appeal lay to the Court of Session—1

BOM L R 835 The present section as now amended now expressly makes reference to a sentence under section 380

COURT OF SESSION —Where a Magistrate was authorised to try all offences throughout the whole District, and there were two Sessions Divisions in the District an appeal from a sentence of the Magistrate will lie to the Sessions Division within whose jurisdiction the Head-quarters of the Magistrate were situate, irrespective of the place where the offence was committed—30 MAD 136, 1918 P R 7

APPEAL HEARD WITHOUT JURISDICTION —Where an accused person was acquitted by a Sessions Judge in an appeal which he had no jurisdiction to hear he may be re-arrested even after the expiration of the period to which he was originally sentenced to be imprisoned and made to undergo the rest of his term—Ratanlal 17

PROVISO (b) —The reason for this proviso obviously is that when a long term of imprisonment has to be undergone the question whether the offence is proved should be tried in appeal by a Court of a higher grade than it would be tried by if the sentence were less—4 L B R 33

The sentence of imprisonment exceeding four years in this proviso must be taken to mean the *substantive* sentence of imprisonment apart from any sentence of imprisonment in default of fine—1918 P R 19 L B R (1900—1902) 37

CONCURRENT SENTENCES —Under section 35 (3), concurrent sentences cannot be aggregated together for the purpose of raising the status of the forum of appeal—3 P L J 138 Therefore, where an Assistant Sessions Judge passes sentences upon an accused each of which is four years or under and they are ordered to run concurrently the appeal from the conviction and sentence lies to the Sessions Court and not to the High Court—23 C L J 595, 3 P L J 138

Magistrate acting under section 30 —Under this proviso, where a person is convicted by a Magistrate invested with enhanced powers under section 30 an appeal lies to the High Court, and not to the Court of Session—1900 P R 12, 1916 P R 5

'ALL OR ANY OF THE ACCUSED' —“This amendment provides that in a trial in which more than one person are accused, and in which by reason of the sentences passed an appeal lies in the case of some persons to the Sessions Judge and of others to the High Court, the appeal of all shall lie to the latter tribunal”—*Statement of Objects and Reasons* (1914) If several persons are tried jointly,

A *private* prosecutor can neither present an appeal under this section nor apply in revision—14 MAD 363, 7 CAL 447

HIGH COURT —An appeal will lie under this section only to the High Court. Where a District Magistrate entertained an appeal from an order of acquittal passed by the subordinate Magistrate under section 247 owing to non appearance of the complainant it was held that the District Magistrate acted without jurisdiction—7 MAD 213

ORDER OF ACQUITTAL —The withdrawal of a complaint by a complainant operates as an order of acquittal—19 W R 55. A judgment passed by the Sessions Judge, following the verdict of the jury acquitting the accused is a judgment of acquittal for the purpose of appeal by the Local Government—2 CAL 273. The words 'appellate order of acquittal' mean and include all judgments of an Appellate Court by which a conviction is set aside—24 W R 41

The 'acquittal' contemplated by this section need not be acquittal upon all the charges. Where in a case tried by jury, an accused charged with murder was acquitted of that charge but was convicted of culpable homicide not amounting to murder, this section did apply and an appeal by the Local Government would lie in respect of the charge of murder, even though the judgment of the Sessions Judge was not a judgment of absolute acquittal—2 CAL 273

The Local Government can appeal only against an order of acquittal, it is not open to the Government to appeal against an interlocutory order, *e.g.*, an order refusing to add or alter charges—16 BOM 114

WHEN APPEAL WILL LIE —Although the right of appeal against an order of acquittal conferred under this section on the Local Government is unlimited—2 CAL 273, 1917 P R 43, still an appeal by Government from orders of acquittal should be made only in cases of some importance—1893 P R 15 and where there has been grave miscarriage of justice—22 CAL 101. The High Court will not interfere merely because it might itself sitting as a Court of original jurisdiction would have arrived at a different conclusion—1903 P R 11, 1918 P W R 19, 1 AIL 118, 1916 P W R 7 but it must be shown before an appeal can be accepted that the judgment of the Lower Court was so clearly wrong that its maintenance would amount to a miscarriage of justice—1897 P R 10, 1 AIL 118, 36 AIL 212, 3 P L T 393, 19 Cr L J 897 (Punjab). The Court will not accept an appeal against an acquittal merely because the trial in

the court below was illegal on account of misjoinder of charges; the Appellate Court will interfere only where it is satisfied that the order of acquittal is obviously erroneous or is one which should not be maintained owing to the trial Court having omitted to consider material evidence—19 Cr L J 957 (Punjab) Sound principles of criminal jurisprudence require that the indication of error in a judgment of acquittal ought to be clear and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of a conviction—1904 P R 7, 21 Cr L J 349 (LAH) Where there has been an acquittal by an unanimous verdict of the jury accepted by the Sessions Judge, the mere fact that there has been a misdirection to the jury will not justify the reversal of the verdict unless the misdirection has in fact occasioned a failure of justice—26 C W N 508 The right of appeal will be exercised under this section only in those cases where it is highly probable that the appeal will end in conviction—1918 P W R 30, 1885 P R 29 or where there exist special circumstances such as gross miscarriage of justice the production of fresh and credible evidence or interests of justice and of the public calling for the right of appeal—1880 P R 29 Where the evidence is all oral and its credibility is a mere matter of opinion without involved legal considerations the opinion of the Court which heard the case

as regards dealing with the evidence in the appeal—20 C W N 128, 21 BOM L R 1051

If the High Court thinks that the lower court has taken an erroneous view of the evidence and should have convicted the High Court can convict the accused in the same way as it can acquit an accused in an appeal against a conviction if it thinks that the lower court ought to have acquitted—21 BOM L R 1051

But it would be improper for the High Court to consider the appeal on grounds not contained in the objection urged on behalf of the Government—19 BOM 51 17 C P L R 75

In a criminal appeal by the Government to the High Court the arrest of the accused may be ordered pending appeal—1 CAL 281, 2 ALL 310 In capital cases in which the Government appeals under this section it is undesirable that the prisoner's fate should be discussed while he remains at large, in such cases the Government should apply for the arrest of the accused under section 127—9 ALL 528

Where on an appeal under this section the accused is arrested and convicted and sentence is passed on him the sentence will run from the date of the commitment of the accused to jail and not from the date of the arrest or of the sentence—6 C L R 349

LIMITATION—An appeal under this section must be presented within six months from the date of the order appealed against (See Art 15 of the Indian Limitation Act 1908)

418. (1) An appeal may be on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal shall be on a matter of law only

Explanation—The alleged severity of a sentence shall for the purposes of this section be deemed to be a matter of law

(2) *Notwithstanding anything contained in sub-s (1) or in S 121 sub-S (2) when, in the case of a trial by jury, any person is sentenced to death, any other person convicted in the same trial with the person so sentenced may appeal on a matter of fact as well as a matter of law*

CHANGE—Subsection (2) has been newly added by section 115 of the Criminal Procedure Code Amendment Act 1921. The reason is stated below

SCOPE OF SECTION —This section is applicable alike both in appeals by Government (section 417) against an order of acquittal and to appeals by convicted persons against conviction and sentence—17 C P L R 75 (at p 92) Therefore, where in a case tried by jury, the Local Government applied to the High Court under section 417 against an order of acquittal, and the grounds of appeal were all questions of *fact* the High Court rejected the application, because under this section, an appeal in a jury-case can be only on a question of law—10 CAL 1029

TRIAL BY JURY —Where the trial was by jury, the appeal will lie on a matter of law only. By restricting appeals from cases triable by jury to matters of law only, this section gives finality to the verdict of the jury where there has existed no error of law nor misdirection and where the Judge has concurred with the majority—Ratanlal 79)

The words "where the trial was by jury" mean "where the trial was in fact held by jury" and not "where the trial ought to have been held by jury". And therefore where the accused was tried by jury in a case which ought to have been tried with the aid of assessors, no appeal would lie except on a question of law; the trial would be treated as one by a jury—25 BOM 680, 23 BOM 696, 25 CAL 355, 3 BOM L R 278. But in 3 CAL 765, 24 W R 30 Ratanlal 961, 18 W R 59, it was held that in such a case the trial would be treated as one held with the aid of assessors, taking the verdict of the jury as the opinion of the assessors, and the prisoner would not lose his right of appeal on the facts. In 26 MAD 243 where a person was charged with an offence triable by jury, and the jury acquitted him of that charge but found him guilty of an offence triable with the aid of assessors, *Benson J* held that the verdict was to be treated as the opinion of the assessors and that an appeal lay on the facts of the case but *Bhushyam Arupner J* held that the jury had authority under section 238 in trying an offence triable by jury, to find as an incident to the trial that certain facts are proved in the trial which constitute a minor offence and to return a verdict of guilty on such offence though such offence might not be triable by a jury, and therefore in this case the verdict was to be treated as a verdict on a trial by jury and an appeal would lie only on a point of law.

In a case where a person is tried by a jury, and there is also another charge which is tried by the Judge with the same jury as

STAMP —When the appellants are in custody, no stamps are required for the petition or for the copy of judgment. But where certain persons who were undergoing imprisonment presented an appeal with an unstamped copy of the judgment the other appellants who were not in custody were not entitled to take advantage of that unstamped copy. They should be required to put in a proper stamp—2 Weir 467

Where a stamp is required (*i.e.* where the appellants are not in custody), the petition of each individual prisoner must be separate, and separately numbered and accompanied by separate copies of judgment or order appealed against. But if no stamps are required for the petition (*i.e.* where the appellants are in jail), it is immaterial whether the appeals of several appellants are made jointly in one petition or separately. See BOM H C Cr Cir p 42

CONTENTS OF THE PETITION —A petition of appeal in a case tried by jury can be made only on a question of law, and the petition should state clearly in what respect the law has been contravened—1 W R 21 (cited under section 418)

A petition of appeal containing defamatory statements against the Magistrate will not be entertained. Such petition may be returned for representation after eliminating the scandalous remarks—15 BOM 488

A petition of appeal containing a false statement will not make the petitioner liable to punishment for false statement because a criminal appeal is a continuation of the criminal case and the appellant has all the privileges of the accused—12 MAD 451 (*cited* under section 312)

PRESSENTATION OF PETITION —As regards presentation no special method is enjoined in the Code and the question is one of administrative convenience alone. Therefore an actual presentation to an officer of the Court such as a Bench Clerk (in the High Court) or to one of the Judges its members is valid—29 M L J 101. But depositing a petition of appeal in a box kept for the convenience of parties (in the compound of a Court house) and intended for the deposit of papers for the Court is not a proper presentation because the box is not intended for appeals and also because a petition of appeal might have been deposited there by a person who could not legally present it—19 MAD 454

The petition should be presented in person, the transmission of it by post is not a sufficient compliance with the requirements of this section—2 Weir 467, Ratnmal 461, 15 MAD 137

PRESENTATION BY PLEADER—The petition should be delivered to the proper officer of the Court, either by the appellant or by his pleader—15 MAD 137 Presentation of appeal by the vakil's gomasta or clerk is equivalent to presentation by pleader, if the vakil has signed the petition and has been duly authorised by a vakalat-nama—2 Weir 469 20 MAD 87 But presentation of the petition through a person who is not the clerk of the pleader, and over whose action and conduct the pleader has no control is not a proper presentation—21 MAD 111 Where a petition of appeal was prepared on behalf of three accused and signed under vakalat by their pleader, and was presented by another pleader who held a vakalat only from one of the accused it was held that there was a proper presentation of the petition of appeal on behalf of all the accused—2 Weir 476 But where the prisoners had conflicting interests to each other, e.g., where each of the prisoners made confessions exonerating himself and incriminating the other it would be improper for one pleader to present an appeal on behalf of both and to represent both who had conflicting interests—1890 P R 13

The word 'pleader' includes a 'mukhtear' as well as any other person authorised by the appellant and the presentation of the petition through them would be proper—6 BOM 14, 1 MAD 304 But these rulings must be read subject to the definition of the word 'pleader' given in Section 4 (r) where it is laid down that a mukhtear or other person may act as a pleader only *with the permission of the Court* See also the proposed amendment as regards mukhtears, cited at page 18 *infra*

COPY OF JUDGMENT—It is in the discretion of the Appellate Court to admit an appeal without its being accompanied by a copy of the judgment or order appealed against where injustice might accrue to the appellant by insisting on a strict compliance with this section But in such cases before hearing the appeal the Court should have before it a copy of such judgment or order which it may get by sending for the record—5 BOM L R 704

Where there were several accused in a case and all of them preferred a joint appeal with which only one copy of the judgment appealed against was filed but the District Magistrate insisted on separate copies of the judgment it was held that the District Magis-

trate would have exercised a sounder discretion if he had dispensed with separate copies of the judgment appealed against—5 BOW I R 704

A copy furnished in the prisoner's own language is sufficient—Rutanlal 82 See notes under Section 371

420. If the appellant is in jail he may present his petition of appeal and the copies accompanying the same to the officer in charge of the jail, who shall thereupon forward such petition and copies to the proper Appellate Court

This section deals with the manner of presentation of appeal by a prisoner in jail but it does not dispense with the formalities prescribed by section 419 These formalities must be observed see 11 A W N 18 and 13 M T 171 cited under section 419

Where the petitioner is in jail every facility such as pen and paper and even a writer should be allowed to him to enable him to prepare the petition of appeal—13 W R 69 1 B H C R 16

There is nothing in this section to indicate that it is intended to deprive the appellant in jail of the opportunity of being heard in appeal Therefore where the appellant is in jail notice of the date of hearing should be given either to him or his pleader so that he may have a reasonable opportunity of being heard in support of his appeal—2 Weir 172

Where a jail appeal has been presented through the officer in charge of the jail and has been dismissed no further appeal can be preferred through Counsel under section 419 *ante*—21 O C 301 11 M L 759 14 M T 1 180 The reason is that when a right of appeal is once been exercised and that appeal has been disposed of the accused will not be allowed to appeal again—11 M T 759 The contrary view has been held in 17 Cr I J 183 (Ordh)

421. (1) On receiving the petition and copy under S Summary dismissal 419 or S 420 the Appellate Court of appeal shall peruse the same and if it considers that there is no sufficient ground for interfering it may dismiss the appeal summarily

Provided that no appeal presented under S 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same

(2) Before dismissing an appeal under this section, the Court may call for the record of the case, but shall not be bound to do so

APPELLANT NOT BOUND TO APPEAR—An appeal should not be dismissed merely because the appellant failed to appear to support the petition, but the Appellate Court must consider whether there exist sufficient grounds for its interference, and must judicially determine the appeal on the merits—Ratanlal 593 If the appellant does not appear but leaves the question of admission or rejection of the appeal to be determined by the Appellate Court on the papers, the Appellate Court is bound to peruse the papers and the appellant is not bound to appear a second time by counsel or in person—Ratanlal 739 see also 20 Cr L J 271 (PAT) But if the Appellate Court thinks that the presence of the prisoner (appellant) is necessary for the purpose of disposing of the appeal the Court can direct that the prisoner be brought before it—2 Weir 473

'No sufficient ground for interfering'—The appellant's pleader should be allowed if necessary to refer to the certified copies of the evidence to show that there were sufficient grounds for interfering. Where the Judge disallowed the pleader to refer to the evidence he acted erroneously—11 O C 360

Where there are in the memorandum of appeal allegations of withholding witnesses of refusals to grant warrants and summonses to witnesses and of disregard of certain evidence filed in the case, there were sufficient grounds for interference—Ratanlal 916 So also where the grounds of appeal disclose reasons for discrediting the witnesses for the prosecution there are sufficient grounds for interference and the Appellate Court ought not to dismiss the appeal—29 MAD 236

If no sufficient grounds of interference are shown, the Appellate Court should not interfere but should dismiss the appeal—5 ALL 386

SUMMARY DISMISSAL OF APPEAL—Although this section gives the Appellate Court power to dismiss an appeal summarily, that power must be exercised with judicial discretion Appeals which are complicated both in law and fact ought not to be summarily dismissed—19 Cr L J 228 (CAL) 3 P L J 389, 22 Cr L J 319 (PAT)

An order of summary rejection of appeal under this section is final Such an order is not open to review and it is immaterial

whether such order was made before or after the papers are called for—4 BOM 101, 19 BOM 732, 1887 P R 24 But if the appeal has been dismissed for default of appearance and it is proved to the satisfaction of the Appellate Court that there is a reasonable excuse for the default of the pleader's appearance, the Appellate Court may rehear the appeal on the merits—7 M H C R APP 29

When an appeal is dismissed under this section the Court has no power to *alter* (diminish or enhance) *the conviction and sentence*—2 Weir 475, Ratanlal 304, Ratanlal 384, Ratanlal 74 If he wishes to alter the sentence, he cannot do it summarily under this section but must proceed according to Secs 422 and 423—2 Weir 474 Ratanlal 384

Withdrawal of appeal—A petition of appeal presented for admission may be withdrawn, before it is dismissed under this section—5 C L R 372

Order of dismissal, not a judgment—An order of summary rejection of appeal under this section does not amount to a judgment, within the meaning of sec 424 The essential difference between a rejection under sec 123 and a rejection under this section is that in the former case the appeal is disposed of after a trial but in the latter case, the Court refuses to try it at all—6 C P L R 21

Admission of a connected appeal—Where two connected presented two appeals, the fact that the Appellate Court admitted the appeal of one of the appeals, does not affect his power to dismiss the other appeal summarily under this section—5 C W N 332

Judgment and record of reasons—An Appellate Court in rejecting an appeal under this section is not bound to write a judgment or give reasons for its decision—21 CAJ 92, 20 BOM 510, 24 MAD 534, 2 P L J 695, 9 C W N 623, 13 N L R 169, 19 Cr L J 116 (BIR), 17 B R (1906) 2nd Qr 19 Still it is advisable that a Court which dismisses an appeal under this section should briefly record its ground for such dismissal, in view of the possibility of such order being challenged by an application for revision—15 A W N 68, 8 ALL 511, 36 ALL 196, 2 P L J 695, 2 P L T 10, 17 ALL 211, 13 N L R 169, 1 P L W 212 Though ordinarily an Appellate Court in rejecting an appeal summarily is not bound to record a judgment, still the Court should not dispose of an appeal under this section otherwise than by a judgment showing on the face of it that it has applied its mind to a consideration of the evidence on the record and of the pleas

raised by the accused both in the Court below and in his memorandum of appeal—38 ALL 393, 21 Cr L J 139 (PAT), 1 P L T 318, 2 P L T 10

The Appellate Court need not go to the length of writing an elaborate judgment but should notice briefly and clearly what objections were urged on appeal and how they were disposed of—32 CAL 178. It should record at least so much as would satisfy the High Court when an application for revision is made that it had fully considered all the questions in issue and had appreciated the simplicity or gravity of the case—2 P L J 695. Where no reason is given the summary dismissal would involve either a remand of the appeal to be admitted and heard or an examination of the evidence by the High Court—1 P L W 212, 19 Cr L J 316.

RIGHT OF APPELLANT TO BE HEARD—It is not competent to the Appellate Court to reject an appeal summarily without giving a reasonable opportunity to the appellant or his pleader of being heard—29 MAD 236, 2 P L T 10. If the appeal is rejected under this section without hearing the appellant or his pleader, the Appellate Court may be directed to rehear the petition of appeal, and to give the appellant an opportunity of being heard—Ratanlal 707. Where the Appellate Court rejected the appeal summarily owing to default of the pleader's appearance and satisfactory reason for non appearance was shown the Court should rehear the appeal on the merits—7 M H C R APP 29, 5 N L R 76. Where the District Magistrate called upon the appellant's pleader to argue the appeal on the same day that it was presented and on the pleader asking time the Magistrate refused to grant him time and rejected the appeal it was held that the appellant's pleader was not afforded reasonable opportunity of being heard—7 BOM L R 89, 36 CAL 385. But where the Appellate Court heard the appellant's pleader in support of the appeal, and then sent for the records of the case, but disposed of the case without hearing the appellant's pleader a second time held that the Appellate Court did not act illegally—2 S L R 39.

Even when an appellant is in jail reasonable notice should be given either to him or his pleader so that he may have a reasonable opportunity of being heard in support of the appeal—2 Weir 472, 3 A L J 693.

Notice—Reasonable notice of the day on which the appeal is to be heard must be given to the appellant or his pleader, so that

he may have a reasonable opportunity of being heard in support of his appeal—*Bombay Gazette*, 1879, Pt 1 p 473 A general notice posted in the Court that appeals will be heard for admission only on the first Court day next after presentation is not in compliance with the provisions of this section The Court should fix a time in each particular case, so as to enable the appellant or his pleader to be heard—5 MAD 11 The fact that the appellants pleader was present in Court when an order admitting the appeal was passed will not save the necessity of giving a separate notice to the appellant The notice must be given to the *appellant*, a substituted notice to the appellants pleader or mukhtear is not sufficient—10 C L R 57 But it should be noted that the words in this section are 'appellant or his pleader' and therefore notice to the pleader must be deemed to be sufficient The case was decided under the 1872 Code, in which the words 'or pleader' did not occur

If the hearing of the appeal is adjourned to another date, notice of the adjournment should be given to the appellant—20 Cr L J 271 (PAT) Where a Magistrate disposed of an appeal before the day fixed for the adjourned hearing, and without giving notice to the appellant or his pleader, it was held that the procedure was illegal—2 Weir 475

SUB-SECTION (2) —Although the legislature does not make it obligatory on the part of the Appellate Court to send for the records before dismissing an appeal, still such a course of dismissing an appeal without calling for the records is always inconvenient and must not be adopted—3 A W N 145 Where the grounds of appeal disclose reasons for discrediting the witnesses for the prosecution the Appellate Court ought to call for the records—29 MAD 236

A Magistrate is not bound to call for the record in an appeal in which the only question is a mere question of fact and the judgment of the Court below is so plain and clear that calling for the record would be a mere waste of time But when the judgment of the lower Court is a long and intricate judgment requiring careful consideration the Appellate Court ought not to refuse to call for the record—3 P L J 389 Where there are disputed questions of fact and a large number of documents an appeal ought not to be summarily dismissed without calling for the record—22 Cr L J 311 (PAT)

REVISION—Where an appeal has been dismissed summarily under this section without recording any reasons or judgment, the High Court can either *go into* the case on its own account and examine the evidence, or can *remand* the appeal to the Lower Appellate Court to be admitted and heard—4 P L W 212 Though the practice usually is to remand the case to the Lower Appellate Court and ask for a judgment from that Court after a regular hearing, the High Court has a discretion to go into the case itself and if necessary to consider questions of fact as if in first appeal—13 O C. 309, 19 Cr L J 316 (BUR) If the High Court finds that the case is one which should not have been dealt with summarily, the High Court will send back the case ordering the Appellate Court to hear it on its merits and pass a judgment—19 Cr L J 316 (BUR) Where the Sessions Judge summarily dismissed an appeal from the conviction of a Magistrate the High Court itself, finding that the evidence on which the conviction was based was insufficient set aside the conviction and acquitted the accused instead of remanding the appeal for a rehearing on the merits—10 C W N 446 See also 13 O C 309

422. If the Appellate Court, does not dismiss the appeal summarily, it shall cause notice of appeal notice to be given to the appellant on his pleader, and to such officer as the Local Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal

and, in cases of appeals under S. 417, the Appellate Court shall cause a like notice to be given to the accused,

RESTRICTIVE ORDER FOR ADMISSION—A restrictive order for admission of a criminal appeal is not contemplated by this section and must be deemed to be *ultra vires*. Therefore, where a criminal appeal was admitted for consideration of the sentence only, it was held that the whole appeal should be heard and that the appellant could not be restricted to any selected ground out of those specified in his petition—41 Cal. 406 Except where there are express words as in secs. 412 and 418 the Code does not provide for an appeal for the limited purpose of reviewing only a part of the sentence. The appellant has a right to be heard fully on the

merits and the Judge is bound by sec 424 to record a complete judgment—Ratanlal 826

NOTICE —Notice to the appellant of the time and place of hearing is obligatory, and it is a material error in procedure to dispose of an appeal without giving such notice—2 Weir 475

In whom to be given —Notice must be given to the *appellant* or *his pleader*. The ruling in 10 C L R 57 which laid down that a notice must be given to the *appellant* and that a substituted notice to the *pleader* is not sufficient, is no longer good law. That case was decided under the Code of 1872 where the words 'or pleader' did not occur. But the attention of the pleader should be directed to the notice when notice is given to the pleader only, the mere fact that the pleader of the appellant is present in Court when an order is made admitting an appeal is not sufficient.

The word 'pleader' includes *mukhtar* and notice to the *mukhtar* is sufficient for the purposes of this section—6 BOW 14

If the appellant could not be found at the address given by him the notice of the hearing of appeal or a copy of it should be left at the address given—Ratanlal 869

In case of appeals under sec 417 notice must be given to the *accused*

Where the Court passes an order awarding compensation to the *accused* under sec 250 and the complainant appeals, notice should be given of the appeal to the *accused* so as to afford him an opportunity of supporting the order passed in his favour although there is no express provision of law directing the giving of notice to the *accused* in such a case—29 MAD 187. The absence of notice to the *accused* does not vitiate the appellate proceedings—41 M L J 172

Although this section does not require any notice to be given to the *complainant*, still in appeals from orders under sec 515, (directing that the expenses properly incurred by the prosecution be defrayed out of the fine) it would be better in practice to give notice to the *complainant* also. But the absence of such notice will not afford any ground for interference in revision—11 N L R 131

Notice should also be given to such officer as the Local Government appoints—29 MAD 187. In Bengal notice should be given to the Legal Remembrancer so far as the High Court is concerned. In other cases the District Magistrate has been appointed as the officer to receive notices of appeals. If the rule is granted against the order of a Sessions Judge he is the proper person to show cause

—7 C W N 80, *Colcutta Gazette*, 1883, Part I, page 1200 In Bombay, District Magistrates should be served with notice—*Bombay Gazette*, 1883, Part I, page 182, 21 BOM L R 1150 The same is the rule in Panjab, Oudh and C P See *Punjab Gazette*, 1883, Part I, page 53, *Oudh Crim Digest*, p 27, C P Gazette, 1883, Part II, page 101 In Madras the Public Prosecutor is the officer to be served with notice in case of appeals to the Sessions Court and the High Court—*Fort St George Gazette*, 1887, Part I, page 30 In other cases, the District Magistrate is the proper officer Thus, in an appeal before the Joint Magistrate, notice should be served on the District Magistrate—1915 M W N 510

Omission to give notice to the District Magistrate is an illegality and not merely an irregularity—24 BOM L R 1150 But objection on the ground of absence of notice should be made by the District Magistrate and not by the complainant and the High Court will not interfere in revision at the instance of the complainant where the objection on the ground of absence of notice to the District Magistrate comes not from the District Magistrate but from the complainant—25 BOM L R 251

Time and place of hearing—The notice must specify the exact date of hearing It is not enough that the Magistrate had directed that the appeal would be heard in a certain month (*e g* in January)—1 A W N 46 So also a general notice posted in the Court house that the appeals will be heard for admission on the first Court day next after presentation of the appeal is not sufficient The particular date must be fixed—5 MAD 11

It is imperative on a criminal Appellate Court to hear the appeal at the time and place named in the notice of appeal—5 N L R 76 Therefore where a notice is issued fixing a particular place for the hearing of the appeal the Court ought not to hear the appeal at a different place without giving notice of the change of place—1891 P R 7 If notice has been issued to an appellant to appear at the headquarters on a particular date and if on that particular date, the officer who will hear the appeal moves out into camp he should fix a fresh date and issue a fresh notice A general order directing appellants to follow the officer into camp is not sufficient—1905 P R 11

ABSENCE OF APPELLANT—When an appeal is admitted and the Appellate Court has sent for the record and perused the same, it is not competent for the Court to dismiss the appeal for non-

appearance of the appellant or his pleader. It can dismiss the appeal only on the merits—13 ALL 171, 1895 P R 21

423. (1) The Appellate Court shall then send to the Court in disposing of not already in Court After perusing such record, and hearing the appellant or his pleader, if he appears and the Public Prosecutor if he appears, and in case of an appeal under S 417, the accused if he appears the court may if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

(a) in an appeal from an order of acquittal reverse such order and direct that further inquiry be made, or that the accused be retried or committed for trial, as the case may be or find him guilty and pass sentence on him according to law,

(b) in an appeal from a conviction (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial or (2) alter the finding, maintaining the sentence or with or without altering the finding, reduce the sentence, or (3), with or without such reduction and with or without altering the finding, alter the nature of the sentence but subject to the provisions of S 106 sub-section (3) not so as to enhance the same

(c) in an appeal from any other order alter or reverse such order

(d) make any amendment or any consequential or incidental order that may be just or proper

(2) Nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him

POWERS AND DUTIES OF APPELLATE COURT—It is the duty of the Appellate Court in dealing with an appeal preferred to it to consider the evidence both oral and documentary and to

14 Cr L J 182 (CAL) If the records of the case are lost, it is the duty of the Appellate Court to order a new trial—9 A W N 53, 5 A W N 117

The Appellate Court is bound to peruse the record and consider whether there is any ground for interference with the acquittal or conviction, *even though the appellant does not appear*. The Appellate Court is not entitled to dismiss an appeal for default of appearance of the appellant. Such an order is not contemplated by this section—20 Cr L J 744, 14 A L J 327 20 Cr L J 271

Sufficient ground for interference—An appellant is not precisely in the same position before an Appellate Court as he is before the Court trying him, but must satisfy the Court that there is sufficient ground for interfering with the order of conviction. If no sufficient ground has been shewn it is the duty of the Appellate Court not to interfere—5 ALL 386

Dismiss the appeal—Where an appeal is dealt with under this section the Appellate Court has no power to dismiss the appeal summarily—1 BOM L R 225

In dismissing an appeal under this section the Appellate Court is bound to write a judgment and the judgment must comply with the requirements of sections 424 and 367. On failure to do so the judgment may be set aside and the appeal directed to be reheard—1 BOM L R 225

RIGHT OF PARTIES TO BE HEARD—When an appeal is preferred and admitted the Appellate Court is bound by law to hear the appeal and to come to a certain finding whether the conviction of the Lower Court is legal or illegal—Ratanlal 978. If the appellant is present or is represented by a pleader the appellant in person or his pleader must be heard—13 ALL 171 20 Cr L J 271

But a complainant cannot claim as of right to be heard in the appeal. The matter is one which may be left in each case to the discretion of the Court—7 M H C R APP 12. A private prosecutor as such has no right to be heard but the Court may grant ~~permission~~ permission in any particular case—1886 P R 20 9 C W N 18

If the Public Prosecutor does not appear on behalf of the Government a valid privately instructed to support the prosecution may be heard—2 Weir 176

The counsel for the appellant has a right of reply—11 C W N 434. There is nothing in the language of this section to preclude the appellant or his pleader from replying to the arguments of the Public

Prosecutor, and as a matter of principle such right of reply should be conceded to him. The practice of the High Court has been uniformly in favour of allowing this right to the appellant or his pleader—1917 P. R. 21, 38 CAL. 707.

CLAUSE (a) —APPEAL FROM ACQUITTAL. —Clause (a) of this section can apply only to the High Court because section 417, which provides for appeals against orders of acquittals, requires that such appeals shall lie to the High Court—7 MAD. 213. Therefore a Sessions Judge has no power to set aside the order of acquittal and direct the commitment of the accused to the Court of Session—2 C. W. N. 221 or to direct further enquiry to be made in a case of acquittal by a Magistrate. Such a power can be exercised only by the High Court—20 CAL. 633. So also a District Magistrate has no power to entertain an appeal from an order of acquittal and is incompetent to reverse a Subordinate Magistrate's order of acquittal and direct a rehearing—7 MAD. 213. 26 MAD. 478.

The discretionary powers of the High Court under this clause will be exercised only when it is satisfied that the case is of sufficient consequence to justify it in acting under this very exceptional section—7 M. H. C. R. 330. In appeals against acquittals the High Court ought not to interfere unless the trying Judge was clearly wrong and the judgment is either perverse or based on obvious error of procedure—16 Cr. L. J. 529 (MAD). The indications of error in a judgment of acquittal ought to be clearer and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of a judgment of conviction—1901 P. R. 7, 21 Cr. L. J. 349. See notes under section 417.

The High Court in exercising jurisdiction in the matter of appeals against acquittals should confine its exercise to the particular acquittal complained of by the Government. At the same time it would not be proper for the High Court to consider the appeal on grounds not contained in the objection urged on behalf of the Government—10 BOM. 51. 17 C. P. L. R. 75. In 12 B. H. C. R. 1, it has been held that a ground of objection not taken in the petition of appeal may be allowed if it has not prejudiced the accused, and sufficient time has been given to the other side to be prepared for the same.

Acquittal —This clause confers a power to direct further inquiry only in respect of a case of an appeal from an order of acquittal, and not in a case in which an order of discharge or dismissal may have been passed—27 CAL. 126.

CLAUSE (b) —APPEAL FROM CONVICTION —In an appeal from a conviction the Appellate Court may if it likes take further evidence (section 428) but cannot direct further inquiry—19 A L J 961

'Reverse the finding and sentence' —Before an Appellate Court can set aside a conviction, it must be satisfied that the conviction is wrong. It seems a logical consequence of this that when without finding the conviction to be wrong, the Appellate Court set it aside the appellate order would be *ultra vires*—17 C P L R 97

An Appellate Court is not competent to set aside a conviction merely on the ground that all the witnesses cited for the defence have not been examined. The proper course in such a case is to have the evidence taken of the other witnesses before disposing of the appeal—2 Weir 481. A conviction ought not to be reversed unless the omission of the rejected evidence would have affected the result of the trial—2 BOM 61

The proper procedure on appeal in a case where the Lower Court had refused to take the defence of the accused is to set aside the conviction and sentence passed by the Lower Court and order the Magistrate to begin the proceedings anew against the accused from the stage when his evidence was refused—1884 P R 28

RE-TRIAL. —A Sessions Judge has power to order a new trial when the case comes before him in appeal. This power should however be sparingly exercised and a retrial should not be ordered unless there are grave reasons for doing so—13 A L J 177

Before quashing a sentence and ordering a new trial on the ground that though the accused was shown by the evidence to have committed some offence he has been convicted under a wrong section the Appellate Court must come to a certain conclusion as to the offence which the accused was shown by the evidence to have committed and it ought to consider whether if the evidence showed that the accused should properly have been convicted of another offence than that he was charged with he would be prejudiced by amending the conviction. Before ordering a retrial the Appellate Court is bound to see what possible object could be served by a fresh trial—2 Weir 481

When retrial is to be ordered —(1) A retrial may be ordered where the trial is held to be illegal on the ground of want of jurisdiction of the Court that tried the case—5 A W N 205. 3 BUR L T 9. This where an offence triable by a Magistrate of the 1st class or

Court of Session was tried by a second class Magistrate the Appellate Court may order the accused to be tried by a 1st class Magistrate or by the Court of Session—5 ALJ. 11, 2 Weir 182 2 Weir 181. In 29 CAL. 412 it has been held that where a trial was void for want of jurisdiction it is not necessary for the Appellate Court to order a retrial and therefore where the Appellate Court in such a case merely discharged the accused and did not order a retrial the omission to order retrial would not prevent the Magistrate from taking further proceedings against the accused. (2) If in an appeal from a conviction the Judge finds that the evidence discloses the commission of a more serious offence he may set aside the conviction and sentence and order the accused to be retried by a Court of competent jurisdiction or committed for trial according to the nature of the evidence against him—11 C. W. N. 1. (3) A retrial would be proper where the accused was rightly acquitted of one offence but the Appellate Court comes to the conclusion that he ought to have been tried for another—36 MAD. 457. (4) If the Appellate Court is of opinion that the appellant ought to have been convicted of an offence different from that with which he was charged in the Lower Court, the Appellate Court ought to annul the conviction and order a retrial—2 A. W. N. 112. (5) A retrial may be ordered in a case in which the Appellate Court set aside the conviction on the ground of misdirection to the jury—1 C. W. N. 576. (6) An Appellate Court in discharging the accused on ground of misjoinder of parties has power to add a direction that the accused should be retried—28 CAL. 101. (7) A retrial ought to be ordered if it is found that the accused had not been properly convicted—3 C. W. N. 132. (8) An Appellate Court may order a retrial if it is of opinion that the proceedings before the Magistrate had been irregular—1 A. W. N. 109. (9) Where the Lower Court committed an error in procedure in convicting the accused upon evidence which was not given in their presence, the Appellate Court was competent to order a retrial—2 Weir 481, so also a retrial may be ordered where the conviction was reversed on account of an irregularity in the procedure by which material evidence was excluded—Ratanlal 938 36 MAD. 457. (10) A Sessions Judge has power to direct a retrial to be had upon a charge framed in whatever manner he thought fit on the ground that the accused had been misled in their defence by the absence of a charge or by a defect in the charges—7 C. W. N. 301 see also 9 N. L. R. 42. Where the trial Court has failed to record a judgment in conformity

with section 367, the proper procedure for the Appellate Court is to reverse the order of the Court below and to remand the case for a trial *de novo*—(1920) M W N 120

Where the Sessions Judge on Appeal annuls the conviction of the accused on the ground of want of jurisdiction of the Magistrate who tried the case, but omits to order a new trial, the Judge is not precluded from passing such order subsequently—3 MAD 48

Where the High Court on appeal set aside the verdict of the jury who convicted the accused, and observing that it would be open to the Crown to proceed further with the case if so advised directed the petitioner to be released on bail until fresh trial if any, it was held that the order amounted to a retrial—16 CAL 212

Scope of retrial —Where an Appellate Court reverses the verdict of a jury and orders a retrial, such retrial unless the Appellate Court has limited the scope, must be taken to be one upon all the charges originally framed—22 CAL 377 13 Cr L J 497 (CAL) Where an order of remand is passed by an Appellate Court under section 423, the Court cannot restrict the evidence to be taken to that mentioned in its order, but it should order the case to be retried in view of the instructions contained in its order. The accused is entitled to adduce such additional evidence as he may desire—3 C L J 303 Thus, where in an appeal from a conviction the Sessions Judge set aside the conviction and ordered a retrial but at the same time directed that the evidence already on the record should be treated as evidence in the case it was held that the order was contrary to the provisions of secs 123 and 128 of the Code, and was therefore illegal—3 P L W 221

When retrial should not be ordered —(1) The mere fact that the Appellate Court finds the decision of the Lower Court not so satisfactory as it should have been does not authorise the Appellate Court to pass an order remanding the case to the Lower Court with instructions to write out a proper judgment—12 CAL 1069 (2) Where a Sessions Judge on appeal thinks that the evidence of some more witnesses who were not examined in the Lower Court is necessary he should proceed under sec 424 (1) and cannot order retrial on that ground—31 CAL 710, 16 A L J 125 (3) Where the evidence recorded by the Magistrate is as full as the law requires, and there is no irregularity in procedure it is not competent to a Sessions Judge on appeal to order a retrial. He must consider the case on the evidence before him and proceed to judgment—Itanlal 540 1 B R

L J 32, the mere fact that an inadmissible or irrelevant evidence has been admitted by the Lower Court does not justify a re trial. Such evidence may be left out of consideration—1 BUR L J 32

'By a Court of competent jurisdiction'—Under this section, when an Appellate Court orders a re trial, it can specify the Court by which the appellant is to be retried. There is nothing in this section which prevents such specification of the Court—Ratanlal 367

If the Appellate Court finds that the accused had committed an offence which the Lower Court was not competent to try, the Appellate Court ought to order a re trial by a Court competent to try the offence—8 ALL 14, 2 Weir 481. Even if the Lower Court was competent to try the offence the Appellate Court may order the re trial by another Court of competent jurisdiction—L B R (1893—1903) 238

Under the provisions of this section the re trial, if ordered must be by a Court of competent jurisdiction subordinate to the Appellate Court, and therefore an Appellate Court cannot direct a case to be re tried by *itself*—Ratanlal 982. But in 30 MAD 228 and 2 Weir 481, it has been held that the words 'Court of competent jurisdiction subordinate to such Appellate Court' are not to be taken as words of limitation and do not exclude the Appellate Court from itself trying the offender when the offence is within the jurisdiction of the Appellate Court.

The Appellate Court may order re trial to be held by any Court of competent jurisdiction. The High Court has power under this section to order a re trial of the appeal by the Lower Appellate Court—1913 P L R 7

ORDER OF COMMITMENT—If the Appellate Court finds that the accused has committed an offence which the Lower Court was not competent to try the Appellate Court may order re trial by a Court of competent jurisdiction and if there is no Court of competent jurisdiction subordinate to the Appellate Court it ought to direct the committal of the accused to the Sessions—2 Weir 481. Where the accused has committed an offence triable exclusively by the Sessions Court and has been tried by a Magistrate the Appellate Court is competent to commit the accused for trial—8 ALL 14. Even if the offence be not exclusively triable by the Court of Session the Appellate Court is still competent to direct a committal to the Sessions—23 CAL 350. This section gives the Appellate Court the power to order an accused person to be committed to the Sessions, when it considers

that that is the procedure which should have been adopted by the Magistrate in the case—16 BOM 580, 15 ALL 205 Thus, a commitment may be ordered by the Appellate Court, if it is of opinion that the Magistrate though of competent jurisdiction to try the case was not competent to punish the accused adequately—1895 P R 16

Where the Appellate Court directs a commitment to the Court of Session, an investigation preliminary to commitment is not necessary—2 Weir 479

Commitment to itself —This section does not authorize a Sessions Court to commit a case to itself, but only empowers it as a Court of appeal to direct a competent Magistrate to make a commitment to itself Reading this section with sec 193 it is manifest that except in cases in which a Court of Session is expressly empowered to take cognizance of an offence as a Court of original jurisdiction it has no power to do so unless a commitment has been made by a Magistrate duly empowered in this behalf—27 A W N 178

CLAUSE (b) (2) —ALTERATION OF FINDING —Though an Appellate Court has power under this section to alter a finding still that power cannot be used arbitrarily, but only in accordance with the other provisions of the Code, such as secs 237 and 238 of the Code—7 M L T 79 The finding which an Appellate Court may alter under this section may relate either to an offence with which the accused was separately charged in the Lower Court or to one of which he might be convicted without a distinct charge—21 M L J 805 An Appellate Court is empowered to alter the finding and to convict the appellant for an offence which the facts established by the prosecution properly constitute—13 C P L R 125 If the prosecution has established certain acts constituting an offence and the Court has misapplied the law to those acts by charging and convicting the accused for an offence other than that for which he should have been properly charged and if in spite of such error of the Court the accused has by his defence endeavoured to meet the accusation of the commission of those acts then the Appellate Court may alter the charge or finding and convict him for an offence which those acts properly constitute provided the accused has not been prejudiced by the alteration of finding—23 CAL 863 10 A W N 80

The Appellate Court in altering a finding under this clause cannot act in contravention of the provisions of section 219 of this Code Thus the petitioner and four others were tried jointly the other four being convicted of an offence under section 451 of the C P Code

and the petitioner was convicted of abetment thereof. On appeal the Appellate Court acquitted the petitioner of the offence of abetment but convicted him under secs 111 and 114 I P C. *Held* that the conviction by the Appellate Court cannot be maintained, because under sec 219 the petitioner could not have been tried in the original Court jointly with the four other accused under sections 111 and 114 of the I P C while they were being tried under sections 134 I P C.—1905 P R 38

Where an accused was convicted of a composite offence, the Appellate Court may alter the conviction into one of the elements of the composite offence. Thus where the accused was convicted of house-breaking by night under sec 477 I P C and the Appellate Court altered the conviction to one under sec 114 I P C it was held that sec 477 I P C applied to a composite offence and under sec 238 of this Code an accused may be convicted of any element of the composite offence and that under this section it was competent to the Appellate Court to alter the finding—Ratanlal 293

Under this section, the Appellate Court can in an appeal from a conviction alter the finding of the Lower Court and find the appellant guilty of any offence of which he may have been acquitted by that Court notwithstanding the provisions of sec 403 of the Code—23 CAL 975. Thus where the Magistrate acquitted the accused under sec 148 I P C and convicted him under sec 325 I P C it was open to the Sessions Judge to alter the conviction under sec 325 into one under sec 148 I P C—34 MAD 515. Similarly where in such a case the Lower Court has found only one of the accused guilty of murder and acquitted the others of murder but convicted them of other offences an appeal against the conviction of murder opens out the entire case and the Appellate Court may find all the three persons guilty of murder—16 A L J 918

If the Appellate Court finds that the sentence is illegal or inadequate and does not think it expedient to order a new trial he may alter the conviction in order to legalise the sentence—3 L B R 112

In altering the finding of the Lower Court the Appellate Court is not bound by any preliminaries of complaint under sec 198. Thus, on an appeal from a conviction under sec 182 I P C the Appellate Court is competent to alter the conviction to one under sec 500 I P C notwithstanding that there was no complaint by the aggrieved party—25 ALL 534

The word 'finding' is not limited to a finding upon a point of law as distinct from a finding upon a point of fact—3 P L J 565

Alteration when improper—The alteration of finding must be of an offence which should have formed the subject of a new and separate charge—8 BOV L R 120, therefore —

(1) An Appellate Court cannot legally convict an accused of an offence for which he was not charged or tried—8 ALL 120, Ratanlal 353, 6 A W N 7

(2) It is improper for the Appellate Court to alter the finding so as to convict the accused of an offence of an entirely different character. Thus it is illegal to alter a conviction under sec 360 I P C into one under sec 366 I P C because the charge under the latter section involves different elements and different questions of fact from the former—8 BOV L R 120 as also it is illegal to alter the conviction under sec 379 I P C into one under sec 143 I P C—27 CAL 660. So also it is improper to alter the conviction under sec 211-109 I P C into one under sec 193 I P C—1 C W N 367, or to alter the conviction under sec 147 into one under secs 418 and 323 I P C—30 CAL 288, or to alter a conviction for wrongful confinement into one for assault—5 C W N 296

(3) It would be improper and unfair to the accused for the Appellate Court to convict him of a more serious offence to which he had never pleaded on the trial especially if the new offence was not cognate to the offence for which he was tried and convicted, and if there were circumstances of aggravation to which he had not pleaded guilty—26 CAL 863, 3 L B R 212

(4) An Appellate Court is not competent to alter the finding of a Magistrate so as to convict an accused person of an offence which the Lower Court is not competent to try—7 ALL 111

(5) When a person has been charged with a certain offence and has been convicted of that offence the Appellate Court cannot on finding that the conviction is not sustainable convict the accused of a different offence—33 MAD 264, 11 B B C R 210

Notice to appellant—If a Judge on appeal finds that the evidence recorded discloses a different offence he may alter the finding of the Court below but in doing so he ought to give intimation to the accused or to his pleader of what he proposes to do and thus give him an opportunity of showing cause against the new conviction—3 L B R 283. The powers conferred by this section on an Appellate Court are not intended to be used in such a way as to

setting up a new case on the accused with not giving him any notice of the charge he has to meet—10 Cr. L. J. 39 (ALL.)

Alteration of conviction.—The Appellate Court is not competent to alter a conviction for an offence into one for that offence or another offence in the alternative. Thus it is improper to alter a conviction under sec. 411 I. P. C. into a conviction under either sec. 379 or 411 I. P. C. in the alternative, the accused not having been charged under sec. 411 I. P. C. in the Lower Court and having had no opportunity of meeting such a charge—Ratanlal 38.

REDUCTION OF SENTENCE.—Where the Lower Court passes only a single sentence on a conviction for two offences, the Appellate Court if acquits the Appellant of one of the offences, ought not to maintain the sentence in its entirety, but must make some reduction of sentence, unless it thinks that the sentence ought not to be reduced, in which case it should refer the matter to the High Court for enhancement of the sentence. 20 MAD. 48. 2 Weir 187A. But no reduction of sentence by the Appellate Court is necessary, if the inference can be drawn that the Magistrate did not intend to pass any sentence on the conviction which is set aside on appeal. 7 M. L. T. 81.

Where a Magistrate in convicting a person of two offences passed a single sentence of imprisonment and fine, it was held that separate sentences ought to have been passed, and that the Appellate Court in reversing the conviction for one offence cannot regard the imprisonment as imposed for one offence and the fine for the other, and reduce the sentence by eliminating the fine—Ratanlal 110.

CLAUSE (4) (b) —ENHANCEMENT OF SENTENCE.—(5) *as not to enhance the same.*—No Appellate Court can enhance the sentence passed by the Lower Court. Ratanlal 618. 4 W. R. 20. The Code of 1872 gave power to Appellate Courts to enhance the sentence, but that power has been taken away by the Codes of 1882 and 1898, and is now vested only in the High Court in the exercise of its power of revision. See Sec. 139 and 6 ALL. 622. And therefore if the Appellate Court finds the appellant to be guilty of a graver offence, the Court has no power to enhance the sentence, and the proper course would be to let the conviction stand as it is, or to have the case referred to the High Court—2 Weir 486.

What amounts to enhancement of sentence.—(1) Where an accused is convicted and sentenced by the Lower Court on two separate charges, and the Appellate Court reverses the conviction on one of the charges, the Appellate Court cannot retain intact the whole

High Court pronounced in the exercise of *revisional* jurisdiction—7 ALL 672, 10 BOM 176, 5 W R 61, 23 BOM 50

The Code does not make any provision for reviewing the judgment of *subordinate Courts*. The High Court can only revise such judgment under the ample powers conferred by section 439—19 BOM 732

435. (1) The High Court or any Sessions Judge or District Magistrate or any Sub-divisional Magistrate empowered by the Local Government in this behalf may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record

Explanation—All Magistrates, whether exercising original or appellate jurisdiction shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of S. 437

(2) If any Sub divisional Magistrate acting under Sub Sec. (1) considers that any such finding sentence or order is illegal or improper or that any such proceedings are irregular, he shall forward the record with such remarks thereon as he thinks fit to the District Magistrate

(3) *Omitted*

(4) If an application under this section has been made either to the Sessions Judge or District Magistrate no further application shall be entertained by the other of them

CHANGE—The italics and words at the end of sub section (1) and the explanation have been added by sub section (3) inserted by the Criminal Procedure Code Amendment Act 1923

By reason of the omission of this subsection, the above orders and proceedings are now subject to revision. See notes under secs 143, 144 145—148 and 176. It is curious to note that in none of the Bill, nor even in the Report of the Joint Committee (1922) was there any proposal to omit subsection (3) of this section, though that committee received suggestions from various quarters that revision should be allowed in respect of those orders and proceedings (see clause 114 of that Report). It was during the Debate in the Assembly that the present Amendment was made.

TO WHOM APPLICATION SHOULD BE MADE—The Revisional Jurisdiction of the District Magistrate and Sessions Judge is concurrent with that of the High Court but although the three tribunals have concurrent powers the aggrieved party should in the first instance seek his remedy before the lower tribunal and not in the High Court direct—3 P L J 302 48 CAL 534. In the matter of applications in criminal revision to the High Court it is a recognised rule of practice that a previous application to the Lower Court (District Magistrate or Sessions Judge) should be considered an essential step in the procedure irrespective of whether such lower court had or had not power to grant the relief claimed, and that failure on the part of the applicant to submit his application to the Lower Court will operate as a bar to the application being entertained by the High Court—43 ALL 497 14 CAL 887 Ratanlal 499 14 BOM 331, 7 C P L R 47 7 A W N 105 10 A W N 161 41 ALL 587 28 ALL 268 30 ALL 116 3 P L J 302, 48 CAL 534 25 O C 37. Thus where the District Magistrate dismisses a complaint under the provisions of sec 203 the High Court will not entertain an application by the complainant asking for further inquiry under sec 437 when no application for that object has been made to the Sessions Judge—28 ALL 268. In 2 L W 1126, however it has been held that it is not an inflexible rule that no revision lies to the High Court unless the party has at first applied to the Sessions Court and that the jurisdiction conferred by the Code on the High Court is wide and it ought not to be fettered by any hard and fast rule.

CALL FOR RECORD—The powers of a Sessions Judge to call for and examine the records under this section are powers which can be exercised at all times—2 Weir 538. Records may be called for even after the prisoner has served out his sentence—7 ALL 135. Even after the death of the prisoner pending an appeal before the Lower

Appellate Court, the High Court has the right to call for the record and make such order thereon as it may deem to be due to justice—2 BOV 564

When records are called for under this section, the inferior Courts must forward the *original* records, and not merely copies thereof—Ratanlal 128

POWER OF REVISION AFTER PRIOR REFUSAL —A Sessions Judge or District Magistrate is competent to exercise his power of revision even though he had declined to interfere on a prior occasion. Where a Sessions Judge of his own motion called for proceedings in which a Magistrate had discharged certain accused persons, but finding on record no cause of interference returned the proceedings to the Magistrate without taking further action, and where subsequently the complainant applied to him to have the case re-opened, and the Sessions Judge holding himself to be barred from taking further action, returned the application to be presented to the Chief Court, it was held that the mere fact that the Judge has declined to interfere on a prior occasion did not preclude him from hearing the complainant, and if the arguments led him to do so, from altering his view—8 L. B. R. 377 8 BUR. L. T. 243 See also Ratanlal 522 *Contra*—5 BUR. L. T. 37 cited under Sec. 436

Fresh Application after prior dismissal —Once a criminal revision case has been dismissed by the High Court for default of payment of printing charges, it is not competent to the High Court to return the case or entertain a fresh application for revision—14 M. L. J. 27

"ANY PROCEEDING" —Under the Code of 1872 the words were 'judicial proceedings' and the High Court could call for and examine the records of a *judicial* proceeding only, but now the High Court can call for and examine the record of *any* proceeding e.g. an order by a Magistrate under section 517—2 Weir 538

It is competent to the High Court to call for the record of any proceeding in an inferior Criminal Court and revise the same whether it is of a preliminary or final nature, 12 A. W. N. 102 Hence when the District Magistrate passed a preliminary order calling upon a witness who gave evidence before him to show cause why he should not be prosecuted for perjury, the High Court was competent to revise the order—14 A. L. J. 851

INFERIOR CRIMINAL COURT —*Inferior* —The term 'inferior' must be construed to mean 'judicially inferior' i.e., a Court over which the Court proceeding under Sec. 435 has appellate jurisdiction—10

CAL 28. Inferior means one who is statutorily incompetent to hold a co-extensive equal power; it carries with it the idea of subordination which means 'inferiority in rank'—9 BOM 100. The term 'inferior' in this section includes the term 'subordinate' as used in section 195. The reason for the employment of the term 'inferior' in Sections 435 and 437 is that in both these sections the Court of Session and the District Magistrate are combined, and the Magistrates other than the District Magistrate though subordinate to him are not directly subordinate to the Court of Session. It was therefore necessary to employ a term applicable to the relation of the Magistrate both to the supervising authority and the appellate tribunal. S. MAD 18.

The District Magistrate is competent under this section to call for and deal with the record of any proceedings before any Magistrate of whatever class in his own district—12 CAL 174. A first class Magistrate is subordinate to the District Magistrate for the purposes of this section—1891 P. R. 10. 7 ALL 821. The District Magistrate can call for and examine the record of any first class Magistrate within the District even though the latter has been appointed as an Additional District Magistrate—1908 P. R. 25. Int. sec. 130—12 III (H. L. T. 76) where it is held that a District Magistrate cannot call for the record of any proceedings before an Additional District Magistrate. This latter view seems to be the view of the Legislature for if the Additional District Magistrate were made inferior to the District Magistrate it would have been expressly stated in sec. 10 (3). *

A District Magistrate is not competent to refer the proceedings of a superior Court (Sessions Court) to the High Court—11 BOM 47. 6 C. 1. R. 215. 23 CAL 201. 2 N. 1. R. 140.

The Court of the District Magistrate is for the purposes of revision a Court inferior to that of the Sessions Judge—19 O. C. 108. All Magistrates including the District Magistrate are inferior to the Sessions Judge—see 12 CAL 471. 9 A. W. N. 100. This is now made clear in the *Explanation* newly added. Even a District Magistrate empowered under sec. 30 is inferior to the Sessions Judge—1904 P. R. 15. The *Explanation* further makes it clear that "for the purposes of this section a Magistrate exercising appellate jurisdiction is inferior to the Court of Session. The point has been held to be open to doubt"—*Statement of objects and Reasons* (1914). The District Magistrate sitting as a Court of appeal is an inferior Criminal Court to the Sessions Judge and the latter can refer an appellate judgment of the former to the High Court—3 LAH 23.

A single Judge of the High Court is not inferior to the Division or Full Bench of the High Court for the purposes of this Section—1909 P R 4, 1909 P R 8 but he may be so only for the purposes of Sec. 431. See notes under Sec. 431.

'Criminal'—The High Court etc. cannot under the provisions of this Section revise an order passed by any Court other than a Criminal Court. A Magistrate hearing an appeal under Sec. 86 of the Bombay District Municipalities Act is not a Criminal Court within the meaning of this Section—9 BOM L R 1347. The term 'inferior Criminal Court' in this section does not include a Civil Court exercising its powers under Sec. 476 *infra*—16 A L R 23.

'Court'—The proceedings which are open to revision are the proceedings of a Court. Therefore executive orders are not liable to revision under this section.

The following orders being executive orders (and not judicial ones) are open to revision:—

(1) A Magistrate's order directing the observance of Municipal Bye-laws which prohibit the slaughter of votive animals in private houses—5 A W N 283.

(2) An order under Sec. 36 of the Legal Practitioners Act—1909 P R 11.

(3) An order passed by a District Magistrate forbidding certain petition writers to practice within the precincts of his Court—22 A W N 175.

(4) The order of a Collector fining a Mulhtar in a *lutuura* proceeding for making certain false statements—10 C L R 11.

(5) An order by a District Magistrate under Sec. 1 of the Sind Frontier Regulation—5 S I R 51.

(6) An order passed by a Magistrate under Secs. 41, 43 or 44 of the Bombay District Police Act (IV of 1870)—15 S I R 126, Ratanlal 692, Ratanlal 540, 12 BOM L R 1020.

(7) A general order by a District Magistrate prohibiting uncertificated pleaders from practising in the Criminal Courts in his District—19 M L J 566.

(8) A Magistrate's order under Sec. 17 of Act V of 1861 appointing certain persons as special constables—20 O C 220.

(9) The order by a District Magistrate for execution of a warrant issued by a Political Agent under Sec. 7 of the Extradition Act—12 CAL 793.

The following orders being judicial orders, are open to revision —

- (1) An order by a Presidency Magistrate under Sec 94 of this Code, refusing to order the production of certain documents—19 CAL 52
- (2) Order passed by a Magistrate under Sec 449 of the Calcutta Municipal Act—33 CAL 287, 34 CAL 341
- (3) Order passed by a Magistrate under Secs 514 and 515 of this Code—1905 P R 15
- (4) Order by Magistrate under Sec 517 of this Code—2 Weir 53
- (5) Orders by Magistrate under Sec 113 of the Railways Act (IX of 1890)—1891 P R 13
- (6) An order by a Magistrate under F B and Assam Disorderly House Act—37 CAL 287
- (7) An order purporting to have been made under Sec 233 of the Cantonment Code (1899)—1900 P R 9
- (8) An order passed by a Magistrate under Sec 161 (2) of the Bombay District Municipalities Act (III of 1901)—43 BOM 864
- (9) An order passed by a Magistrate under Sec 2 of the Workmen's Breach of Contract Act directing either return of the advance or specific performance of the contract—43 BOM 607

When an order is passed by a judicial officer in a matter coming within the purview of law and justice and within the scope of the authority of the Courts the mere fact that the officer passing the order states that he is acting not as judicial officer but in his executive capacity does not oust the revisional jurisdiction of the High Court—1908 P R 4

POWERS OF THE HIGH COURT—Under sections 435 and 439 the High Court in the exercise of its revisional jurisdiction can examine the records of cases for the purposes of satisfying itself as to the correctness or propriety as well as the legality of any finding sentence or order and where there are very exceptional grounds for its interference it will in the interest of justice exercise the powers of a Court of Appeal—14 BOM 331

Under this section the High Court in revision can consider the evidence with a view to find out the legality or propriety of any finding sentence or order but may not re-appreciate the oral evidence on record—28 BOM 479 In the exercise of its revisional powers the High Court will not interfere unless it is satisfied that it is necessary to do so to prevent an otherwise irreparable injustice—9 BOM L R 706, 39 MAD 561 In the absence of some well founded suspicion

it is inexpedient for the High Court to scrutinize orders of discharge or other orders which upon the face of them bear token of careful consideration and appear good and lawful. The section does not give the High Court a roving commission either in the direction of stamping with approval the proceedings of a lower Court or in the direction of questioning doubt and looking to see if possibly under a fair record there lies some trace of possible error—19 A W N 135. See notes under Sec 139.

POWERS OF OTHER COURTS IN REVISION —A Sessions Judge or District Magistrate cannot after calling for records under this section take fresh evidence—2 A W N 116, 3 BOM L R 677.

The powers of a Sessions Judge under this section may be put in force not only on matters coming before the Judge in Court but also on matters coming to his knowledge on reliable information—2 Weir 538.

A Magistrate who calls for and examines the calendar of a case tried by a Subordinate Magistrate under this Section does not act in a judicial proceeding and therefore cannot order the prosecution of any person under Sec 176 as the matter was not brought before him in a judicial proceeding—7 MAD 500 15 M L J 389. It should be noted however that section 176 as now amended applies to all proceedings and not merely to judicial proceedings.

Suspension of Sentence Release on Bail —By the italicised words added at the end of Sub-section (1) "power is given to suspend a sentence or to release an accused on bail pending the examination of the record thus avoiding the result should delay occur that the sentence may have been served before orders are passed.—*Statement of Objects and Reasons* (1911).

POINTS TO BE CONSIDERED IN REVISION —Sessions Judges and District Magistrates when exercising their powers under this section should pay particular attention to the following points in the proceedings of the inferior Criminal Courts: (1) the issue of process; (2) the dealing with disputed claims of right under colour of a charge of criminal trespass or mischief and contrivances held of the Crown or not with or a failure as to the criminal intent; (3) the dishonest acquisition of fires beyond the means of offenders; (4) the light punishment by inferior courts of offences requiring severe punishment in cases which ought to have gone up to a superior court for trial and punishment; (5) the imposition of heavy fines in addition to imprisonment with a view to defeat of object to

extend the term of imprisonment beyond the ordinary powers of the Magistrate to inflict, (6) the exaction of excessive bail or excessive security for keeping the peace or for good behaviour, (7) unnecessary delay in the trial of cases—MAD H C RUL 17-1281, para 17, Weir, App XI

SUB SECTION (4) —The intention of the Legislature in enacting this clause is to prevent the Sessions Judge and the District Magistrate from simultaneously exercising their powers of revision, and to prevent them from exercising their powers in such a way as would amount to one of them as it were hearing on appeal from or reviewing an order passed by the other—4 O C 119

Under this section, the District Magistrate and Sessions Judge have co-ordinate powers, and therefore after an application for revision has been made to the District Magistrate no further application can be entertained by the Sessions Judge even though the Sessions Judge was not asked to revise the order passed by the District Magistrate in revision, but only to call for the record and report the Magistrate's order to the High Court—17 M L J 153, nor can the Sessions Judge act *suo motu* to call for records under this section, after an application has been made to the District Magistrate—1912 P R 10

Similarly the District Magistrate is prohibited by this subsection for entertaining the application for a direction to commit the accused after a similar application to the Sessions Judge has been refused, the reason for the prohibition being the avoidance of a conflict between the orders of the two District authorities having co-ordinate powers in the matter—26 MAD 477 But where an application for revision preferred to the Sessions Judge has been dismissed for want of prosecution the District Magistrate is competent to entertain a second application for revision and exercise his powers under this section—4 O C 119

Where a District Magistrate called for the record of a case in which the accused had been discharged and where the complainant subsequently presented an application to the Sessions Judge to have the order of discharge of the accused set aside and the Sessions Judge sent for the proceedings and after a perusal of them ordered the committal of the accused for trial it was held that the Sessions Judge's action was not illegal, since no application was made to the District Magistrate and the District Magistrate's action in calling for record was not equivalent to entertaining an application—8 L B R 361

A District Magistrate has no power to call for the record of a Sessions Judge under this section since the Sessions Court is superior to his own—2 N L R 149, 6 C L R 245, 2 Weir 565, 2 Weir 566. If, therefore, the District Magistrate considers that there has been a miscarriage of justice in the Sessions Court, he should ask the Public Prosecutor to move the High Court—9 ALL 362, 25 ALL 128, 12 ALL 434, 1 S L R 40, 1912 M W N 812, 2 N L R 149, 6 BOM L R 1099, 8 M L T 88.

436. On examining any record under S 435 or otherwise, the High Court or the Sessions

Power to order inquiry Judge may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the District Magistrate may himself make or direct any Subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under S 203 or sub-section (3) of S 204, or into the case of any *person accused of an offence* who has been discharged.

Provided that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged unless such person has had an opportunity of shewing cause why such direction should not be made

CHANGE—This is the old section 437, and the old section 436 has been renumbered as sec 437. The reason is that the words “instead of directing a fresh inquiry” occurring in the old section 436 referred to the inquiry which can be directed under the next section (437 old) and it was therefore necessary to put the latter section first.

The words “*person accused of an offence*” have been substituted for the words “*accused person*” occurring in the old section. “There have been different rulings as to whether the expression *accused person* in this section means *any person accused of an offence*, and it is now made clear that it does”—*Statement of objects and Reasons* (1914). The proviso has been newly added. “We have added a proviso to this section to give effect to the rule laid down by the Courts that a fresh inquiry should not be made into the case of a person who has been discharged unless he has had an opportunity of showing cause.”—*Report of the Joint Committee* (1922).

WHO CAN DIRECT FURTHER INQUIRY—The mention of the three tribunals together, the High Court, the Sessions Judge

and the District Magistrate shows that the Legislature intended them to have the same power with regard to the matter dealt with under this section—15 CAL 608, 32 MAD 220 But though the powers of the three tribunals are co-ordinate, still as a matter of procedure the application should be made at first to the lower tribunal Thus, where a District Magistrate has dismissed a complaint under Sec 203 the High Court will not entertain an application for revision under this section unless a previous application has been made to the Sessions Judge The High Court will interfere only as a Court of last resort—28 ALL 268, 21 A W N 232 So also where the District Magistrate and Chief Court have concurrent jurisdiction an order under this section will be more conveniently made by the District Magistrate than by the Chief Court—1888 P R 7 In 2 L W 1126 however it is held that it is not an inflexible rule that no revision lies to the High Court unless the party has first applied to the Sessions Court

Since the District Magistrate and Sessions Judge have co-ordinate powers under this section to direct further enquiry it follows therefore that where a District Magistrate has directed an enquiry into a case and decided upon it the Sessions Judge is not competent to order further inquiry under this section—17 C W N 401 See sub section (4) to Sec 435 In like manner when the Sessions Judge has made an order for further inquiry under this section the District Magistrate cannot make a contrary order but should refer the matter to the High Court—12 ALL 434 When a further inquiry has been refused by one of the officers it should not be ordered by the other if the Sessions Judge is of opinion that the order of the District Magistrate for further inquiry was wrong it is open to the Judge to refer the matter to the High Court under sec 438 but he has no power to review the order passed by the District Magistrate under this section—22 CAL 573

A District Magistrate can make or can direct a subordinate Magistrate to make further inquiry into a case in which an order of discharge may have been passed by himself or a subordinate Magistrate—28 CAL 102, 1902 P R 9

A Deputy Magistrate placed in charge of the current duties of the District Magistrate is not thereby invested with the jurisdiction under this section—11 CAL 236

The High Court has no power under this section to order further inquiry in a case of discharge by a *Presidency Magistrate* but it can

do so under sec. 15 of the Charter Act—33 CAL 1282, or under sec 439 read with sec 423 of this Code—36 CAL 994

Further inquiry after prior refusal—A District Magistrate can direct further inquiry though he might have declined to do so on a previous occasion—Ratanlal 522 But when a District Magistrate has once decided under this section that there is no case for further inquiry, he cannot subsequently order further inquiry, such an order is an order reviewing the earlier one and is prohibited by section 369—5 BUR L T 37. Under such circumstances, the Sessions Judge is the proper person to make such order if he thinks fit to do so—4 C W. N 100

“ ”

WHO CAN BE DIRECTED TO MAKE FURTHER INQUIRY

—The District Magistrate may be directed to make further inquiry, even though he exercises enhanced powers under section 30 of the Code—1901 P. R 15 The District Magistrate may direct a subordinate Magistrate to make the further inquiry under this section For the purpose of this section, a first class Magistrate is subordinate to the District Magistrate—7 ALL 833, 8 MAD 18 The District Magistrate has a discretion in selecting the particular Magistrate who is to make the further enquiry under this section, and this discretion is vested with the District Magistrate and not with the Sessions Judge—10 CAL 207

The further enquiry should ordinarily be made by the same Magistrate who held the first enquiry except in case of death or removal of such Magistrate in which case it might be conducted by another Magistrate—8 MAD 296, 8 MAD 336, see also 36 ALL 129 and 36 ALL 53 Where the further inquiry involves the taking and weighing of additional evidence the function will generally be best performed by the same Magistrate who made the previous inquiry, But it is desirable that the further inquiry should be entrusted to a different Magistrate because it is quite possible that the Magistrate who held the first inquiry might have been prejudiced against the accused—Ratanlal 328, 4 L B R 273 Thus, where the Magistrate who held the first inquiry had already expressed an opinion that it is impossible to affix the guilt to the accused the High Court ordered the further inquiry to be made by another Magistrate—Ratanlal 926 Where the first Magistrate held the first inquiry and dealt with the case in a most unsatisfactory way, it was held to be good ground for directing the further inquiry to be held by a different Magistrate—32 MAD 220

But the District Magistrate cannot direct the further inquiry to be held by a Magistrate inferior to the Magistrate who held the first inquiry. Where a case has been tried by Magistrate specially empowered under section 30, and has ended in a discharge the District Magistrate should order the further inquiry to be made by the same Magistrate or by another Magistrate equally empowered, but not by a Magistrate without special powers under sec 30 and therefore in a sense a Court of inferior jurisdiction to the Court which ordered the discharge—12 N. L. R. 94

When the District Magistrate has sent the case to a subordinate Magistrate for further inquiry under this section, the Sub-divisional Magistrate cannot withdraw the case to his own file from that of the subordinate Magistrate—Ratanlal 315. But when a case is sent to the Sub-divisional Magistrate for further inquiry, he can transfer the case to a 2nd class Magistrate subordinate to him—2 Weir 563

IN WHAT CASES CAN FURTHER INQUIRY BE ORDERED
—Dismissal of complaint—Further inquiry may be ordered when a complaint is dismissed under sec 203 or 204 (3)—1891 P. R. 14 2 Weir 563, 11 O. C. 261, 1 N. L. R. 18. But if a complaint was made in respect of one offence and the accused was convicted further inquiry cannot be directed in respect of another offence for which no charge was made in the complaint—26 CAL. 658. Where a case was taken up not upon a complaint but upon a police report a Magistrate's order directing the case to be struck off is not a dismissal of complaint and cannot be revised by the Sessions Judge—Ratanlal 521. No further inquiry can be directed when no complaint was made against a person and no regular process was issued against him—39 CAL. 239. Where a complaint has been dismissed under sec 203 the revisional jurisdiction of the District Magistrate may be exercised even though there may have been some irregularity on the part of the officer taking cognizance upon complaint. This section also contemplates that where a complaint has in fact been dismissed under sec 203 the revisional jurisdiction of the District Magistrate may be invoked irrespective of the consideration whether the dismissal is legal or illegal—

P. L. J. 346. Where a complaint which contained several charges was dismissed in respect of one of the charges and the complaint was dismissed merely on the report of the President of a Panchayet without giving the complainant any opportunity to substantiate his case it was held that there should be further inquiry into the complaint—23 C. W. N. 575. When a complaint has been dismissed under sec

203 by Magistrate a fresh complaint can be entertained by the same Magistrate or by some other Magistrate, even though the order of dismissal has not been set aside nor a further inquiry has been directed by a Superior Court. See notes under sec 203.

Discharge of accused—The District Magistrate may direct further inquiry where the accused has been discharged. But it is not in every case of discharge that a further enquiry may be directed. Where the order of discharge is not perverse or foolish and where the Magistrate has dealt at length with the evidence and recorded what appear to be sound reasons for the discharge interference under this section is illegal—1902 P L R 394 1916 P W R 20, 3 LAH L J 97, 21 Cr I J 571 (LAH). Although the word 'improperly' which occurs before the word 'discharged' in sec 437 is omitted in this section still it is illegal to direct a further inquiry unless the order of discharge was improper i.e. manifestly perverse or foolish or was based upon a record of evidence which was obviously incomplete—1911 P R 10, 1916 P W R 20, 20 Cr L J 592 (LAH), 1 LAH 216 21 Cr L J 571 18 A L J 113, 4 LAH L J 411.

Where a person has been improperly discharged no reference to the High Court is necessary the District Magistrate can himself order a fresh inquiry—Ratanlal 213 Ratanlal 988 *Contra*—8 MAD 336.

No formal order of discharge is necessary, to enable the District Magistrate to direct further enquiry. Where an order is one of discharge in substance though not in form the Sessions Judge or District Magistrate is competent upon motion being made by the complainant to make an order for further enquiry—8 C W N 456. Where after the issue of warrant against certain persons the Magistrate does not think it proper to proceed further and stops further proceedings the termination of proceedings is in effect an order of discharge and is therefore subject to revision under this section—4 C W N 242.

Where an accused was charged with offences under sections 323 and 307 I P C, and the Magistrate framed a charge under section 323 only and said nothing about section 307, *held* that this was equivalent to saying that there was no evidence against the accused of an offence under section 307 I P C and that in effect the accused was discharged of that offence. The Court of revision could therefore order further inquiry—42 ALL 128.

This section applies where the accused has been discharged e.g., discharged under sec 209 251 or 259 of the Code—33 MAD 85, and not where he has been *acquitted*. No further enquiry can be directed under this section when the accused has been acquitted by a Magistrate—20 CAL 633, 8 MAD 296, 4 C W N 346, 5 C W N 72, 7 C W N 493. Even if the order of acquittal was passed without any charge having been framed or evidence for the defence taken, still it cannot be a subject of revision under this section—1 A L J. 415. If the order is in substance one of acquittal though the Magistrate styles it an order of discharge, no further enquiry can be ordered—1900 P L II 31 17 Cr L J 95 (MAD). Thus where in a summons case, the Magistrate follows the procedure of a warrant case and discharges the accused the order of discharge is one of acquittal and no order under this section can be passed—8 M L T 78. Similarly after a charge has been framed in a warrant case, the accused can only be acquitted under sec 258 and not discharged, and if the Magistrate erroneously passes an order of discharge still there can be no order for further inquiry—38 MAD 385. Where after a full trial the accused persons were discharged the discharge was for all practical purposes as good as an acquittal and there should be no order for further inquiry—4 LAH L J 331.

No further inquiry can be directed where the *proceedings have been stopped* under sec 249 and the accused has been released—1913 P R 9.

No further inquiry can be directed in a case where the accused has been *convicted*. If in fact in a case the Sessions Judge thinks that further inquiry is necessary he must report the matter to the High Court which alone can direct further inquiry in such a case—Ratanlal 407.

Where the order is neither one of dismissal of complaint nor one of discharge of accused no order for further enquiry can be passed. Thus where on the acquittal of an accused the other accused against whom process of arrest had been issued surrendered before the Deputy Magistrate, and he passed an order directing that the accused should not be proceeded against and that the warrant and other processes issued against him be withdrawn the order was neither one of dismissal of complaint nor one of discharge of the accused and the District Magistrate had therefore no jurisdiction under this section to set aside the order and direct the retrial of the accused—12 C W N 68.

No further inquiry where no accusation of 'offence' — Further inquiry can be directed only in the case of an accused person and the term 'accused' means accused of an offence and not a person against whom proceedings are taken under Chapter VIII—27 CAL 662, 33 CAL 8 Therefore section 437 does not apply to security proceedings taken against a person under Chapter VIII because such a person is not in the position of an accused person and cannot be said to have committed an 'offence'—27 CAL 662 33 CAL 8 1905 P R 42, 33 MAD 85 1911 P R 6 (*Certa*—21 ALL 107 24 ALL 148 36 ALL 147, 16 BOM 661, 35 BOM 401) The word 'discharged' in section 119 means only permitted to depart and does not mean the discharge of an accused as contemplated by this section therefore further inquiry cannot be directed in a case of discharge under sec 119—33 MAD 85, U B R (1911) 1st Qr 3 (*Contra*—36 ALL 147 19 A W N 203 1903 P R 21 20 Cr L J 704) This is now made clear by the present Amendment by the use of the words "accused of an offence" The contrary rulings cited above within brackets are now rendered obsolete

This section also does not apply to proceedings under sec 133 of the Code since the person proceeded against under that section is not said to have committed an 'offence' A Sessions Judge or District Magistrate acts without jurisdiction if he directs further inquiry into proceedings under that section—24 CAL 395 25 CAL 425

Similarly proceedings under sec 144 do not refer to any offence and no further inquiry can be directed in a case under that section—27 CAL 608

This section does not authorise a Magistrate to direct further inquiry into a case under sec 145 as that section has no reference to any offence at all—20 CAL 729

The District Magistrate cannot direct further inquiry into cases under sec 488 since refusal of maintenance is not an offence and the application for maintenance is not a complaint of an offence—17 C P L R 127, 5 CAL 536

WHEN FURTHER INQUIRY MAY BE DIRECTED — A Sessions Judge or Magistrate has jurisdiction under this section to direct further inquiry or a rehearing upon the same materials which were before the subordinate Magistrate though there is no further evidence forthcoming—15 CAL 608 14 MAD 334 10 BOM 131 1891 P R 14 5 C P L R 20 3 L B R 97 The expression 'further inquiry' in this section does not mean that additional evidence must

be forthcoming. Any mistake of law or irregularity in the proceedings will justify the District Magistrate in setting aside an order of discharge—14 C P L R 161. Further inquiry under this section does not in all cases mean taking of additional evidence, but may mean re-hearing and reconsideration of the evidence already taken—1901 P R 2, 1901 P L R 32, 10 S L R 68. But in 1887 P R 63 it has been held that further inquiry in this section means taking of additional evidence and not a mere re-hearing, and therefore where there has been a full inquiry by a competent Court and the accused has been discharged the Sessions Judge has no power under this section to direct a further inquiry, unless further evidence has been disclosed—1900 P L R 31.

The District Magistrate is not competent to direct further inquiry in any and every case falling under this section. This section is limited by the words "on examining the record" under sec 435 and that section lays down that a Court may call for and examine the record for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceeding of such inferior Court. And therefore a District Magistrate cannot set aside an order of discharge and direct further inquiry if he finds no irregularity, illegality or impropriety in the proceedings—16 C W N 1078.

Where a Magistrate had discharged the accused without considering the necessary evidence the Sessions Judge ought to direct further inquiry in the case—13 BOM 376.

The power of ordering further inquiry under this section should be used sparingly and with great circumspection. Therefore where an accused person has been three times subjected to a Magisterial inquiry, it would be an oppression on the accused to send him a fourth time before the Magistrate for inquiry on the same evidence which has been thrice pronounced to be insufficient and untrustworthy—Ratanlal 328. Sessions Judges and Magistrates should use the powers under this section sparingly and with great caution and circumspection especially in cases where the questions involved are mere matters of fact—6 A W N 281, 9 ALL 52.

The Divisional Court ought not to ordinarily interfere with an order of discharge passed by the trying Magistrate unless it is possible to come to only one conclusion on the evidence viz., that the accused is guilty—10 L W 630, 3 LAH L J 97. Further inquiry cannot be directed on the bare possibility of an offence.

(11) The Magistrate who is directed to make further inquiry is not competent to question the propriety of the order but is bound to carry it out—10 BOM 131

NOTICE TO ACCUSED—See the proviso newly added. Although no notice to the accused was necessary under the old section, still it was held in numerous cases that a Court did not exercise a proper discretion if before proceeding under this section he did not give the accused an opportunity by service of a notice, to show cause against an order directing further enquiry—15 CAL 608, 2 C W N 196, 3 C W N 249, 1901 P R 2 1919 P L R 17, 1 LAH 216, 4 LAH L J 411, 5 BOM L R 877, 1895 P R 17, U B R (1897-1901) 100, 6 BOM L R 479, 8 BOM L R 694, 19 BOM L R 908, 4 P L W 220, 2 Weir 245, 11 C W N 173, 11 C W N 316, 40 ALL 416, 19 A L J 71, 15 A L J 627, 6 ALL 367, 12 A L J 167, 10 A W N 147, 20 ALL 339, 9 ALL 52, 18 A W N 60 24 O C 142. Where a man has been discharged after full enquiry by a competent Court, a Revisional Court will exercise proper discretion in allowing him an opportunity of showing cause before ordering a further enquiry or before directing reopening of the case. It is a principle of British Criminal Law that an order to a man's prejudice should not be passed without due notice to him—8 BUR L T 133. This is now expressly laid down in the proviso.

The opportunity to show cause may be given even after the accused is arrested and brought before the Court—12 C W N 822 32 CAL 1090, 1891 P R 14 1895 P R 17.

Under the old law, the non service of notice to show cause was held to be merely an irregularity—6 ALL 367, and the omission could not be held to invalidate the order or action of the court unless there was reason to think that the accused was prejudiced thereby—U B R (1897-1901) 100, 1 P L J 456. Under the present law, the service of notice is imperative.

Notice is necessary only where the accused has been discharged. No notice would be necessary under this section where the complaint was dismissed under section 203 since the order under section 203 dismissing the complaint was not passed with a notice to the accused person or in his presence and therefore would probably be unknown to him—15 CAL 608, 29 CAL 457 32 CAL 1090, 32 C L J 44, 20 ALL 339, 30 ALL 52, 2 BOM L R 586, 5 A L J 74, 35 ALL 78, 40 ALL 138.

It is competent to the Court which orders the issue of a notice to the accused to cancel that order—1893 P. R. 15

When notice is issued under this section, the accused is not legally bound to avail himself of the opportunity given to him to show cause, and he is at liberty either to appear and show cause or stay away—1893 P. R. 15

RECORDING REASONS.—Before making an order under this section a Sessions Judge or District Magistrate is bound to record his reasons for passing the order—10 A. W. N. 117, 11 C. W. N. 76. The wife petitioned to set aside an order of discharge cannot be properly exercised without having and assigning solid and sufficient reasons for doing so—15 CAL. CR. 1913 M. W. N. 618. The Magistrate should record his reasons for ordering further enquiry, because the High Court in the absence of such reasons could not exercise supervision over the Magistrate's or Judge's proceedings, and also because it is fair to the person against whom the order is made that the reasons for directing such enquiry should be made explicit to him and that he should have notice of the ground on which the further enquiry has been directed—(11 R. (1917) 2nd Qr. 16, 32 CAL. 1190). Where the order of the Sessions Judge for further enquiry does not state any proper grounds, it is liable to be set aside by the High Court—8 C. W. N. 156, 1 S. L. R. 7.

It is not ordinarily desirable that a District Magistrate in ordering a further enquiry should make a detailed examination of the evidence and give elaborate reasons, because that might prejudice the trial afterwards. But it is desirable that he should give enough in the shape of reasons to show that his order is proper—32 CAL. 1090. In a Burma case, however, where in an order for further enquiry the Sessions Judge simply stated, "I have translated and considered the whole of the record, and the conclusion I have arrived at is that there should be further enquiry," it was held that it contained ample reasons for the order—4 L. B. R. 233.

INTERFERENCE BY HIGH COURT.—An order of a Sessions Judge or a District Magistrate setting aside an order of discharge is liable to be reviewed by the High Court as a Court of Revision. If in any case the High Court were to find that the lower Court had set aside an order of discharge on insufficient grounds, or that while there were good grounds for setting it aside, the lower Court has made an order inappropriate to the facts of the case, the High Court would be acting properly in revising the order—15 CAL. 608.

was not triable exclusively by the Court of Session because the two offences were intimately connected and formed part of the same transaction—16 BOM L R 80 So also where an accused person appears to have committed culpable homicide his conviction by a Magistrate of a minor offence does not prevent his trial for murder The Sessions Judge if he thinks there is a *prima facie* case may call on the accused to shew cause why a commitment should not be ordered and may thereafter order his commitment under this section if satisfied that there is sufficient cause for it—Ratnani 317

“IMPROPERLY DISCHARGED —A Sessions Judge may direct commitment even where the District Magistrate himself discharges the accused—7 AIL 853

The mere fact that a Magistrate has discharged the accused in a case triable exclusively by the Court of Session without committing him to the Sessions is not a ground of interference under this section—2 Weir 260 The District Magistrate or Sessions Judge before ordering the committal of the accused to the Sessions Court must come to a finding with reference to the evidence that the accused has been *improperly* discharged—1 P L J 97 The mere fact that the charge is in the opinion of the District Magistrate of such an important character that it should be considered by a Court of Session is not a sufficient reason for interfering with the order of discharge—1 P L J 97

It is the duty of the Sessions Judge in considering whether the accused person has been improperly discharged to consider all the grounds upon which such order of discharge has been passed including a consideration of the evidence which has not been believed or held to be sufficient to establish a *prima facie* case Then only can he pass an order for the commitment of the accused person or for further inquiry—7 C W N 77

The Sessions Judge can direct the committal of an accused person improperly discharged by the sub Magistrate though no *express* order of discharge has been recorded by that Magistrate—10 L W 521

This section applies where the accused person has been *discharged* and not where he has been *acquitted*—20 CAL 633 23 MAD 225 where the Magistrate has in fact discharged the accused though he used the expression ‘acquitted and released’ the Sessions Judge was competent to order a committal under this section—8 W R 41 Where on a complaint, in respect of a sessions offence the Magistrate finding that no sessions offence had been committed tried the

accused of a non sessions offence and acquitted him, it was held that this section did not apply, even the acquittal of the accused in respect of the minor offence could not be construed so as to amount to a discharge of the grave offence and no order under this section could be passed by the Sessions Judge—20 CAL 633 But in 21 MAD 136, this case was dissented from, and the acquittal of the accused in respect of the minor offence, was held to be in substance a discharge of the accused in respect of the grave offence, and the Sessions Judge was therefore held justified in having made an order for further inquiry in respect of the grave offence and committal to the sessions In the more recent case of 22 C W N 117 upon similar facts the Judges were divided in opinion, Tennon J holding the same view as in the Madras case cited above and Richardson J upholding the view of 20 CAL 633

‘BY AN INFERIOR COURT —I or the meaning of ‘inferior’ see notes under sec 435

A Subordinate Magistrate of the First Class invested with powers under sec 30 is inferior to the District Magistrate and the latter can revise an improper order of discharge passed by the former in a case triable exclusively by the Court of Session—12 N I, R 94

‘ORDER HIM TO BE COMMITTED —Under this section the Sessions Judge can himself commit the accused The words ‘order him to be committed’ do not mean more than ‘pass an order for his committal and the intervention of a Magistrate for making the commitment is not necessary—10 BOM 319 There is nothing in this section to shew that when a District Magistrate or Sessions Judge directs a discharged person to be committed for trial the commitment must be made by the discharging Magistrate—Ibid But of course it is not wrong to call upon the discharging Magistrate to make the commitment—19 BOM 100 28 CAI 397

This section enables the Sessions Judge or District Magistrate to commit the accused person for trial only for the offence with which he was substantially charged in the complaint—19 W R 30 When the accused has been discharged by the subordinate Magistrate of one offence the Sessions Judge is not competent to direct the accused to be committed for trial for another offence—2 Weir 519

Thus, where the police charge sheet on which the subordinate Magistrate took cognisance of a case charged the accused with a minor offence and the grave offence of rape was not mentioned in it nor did the prosecution press for the framing by the Magistrate of a

Sessions Judge or District Magistrate passed under this section may consider the facts as well as the *question of law* involved and is not limited to points of law only as under sec 215—30 MAD 224 12 C W N 117 1 P L T 153

But though the High Court possesses the powers to revise orders of commitment it should exercise those powers most sparingly, and only where it is manifest that the Sessions Judge's order is improper *e.g.* where there is no evidence to prove the offence charged—30 MAD 224 It is evident from this section that the fullest and widest discretion has been given to District Magistrates and Sessions Judges and when an order of commitment has been duly made the High Court should be most unwilling to interfere except upon strong grounds and under exceptional circumstances—26 ALL 564 13 A L J 111

438. (1) The Sessions Judge or District Magistrate may, Report to High if he thinks fit, on examining under Court section 435 or otherwise the record of any proceeding, report for the orders of the High Court the result of such examination and when such report contains a recommendation that a sentence be reversed or altered, may order that the execution of such sentence be suspended and if the accused is in confinement, that he be released on bail or on his own bond

(2) An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him by or under any general or special order of the Sessions Judge

Clange —The italicised words have been added by the Criminal Procedure Code Amendment Act 1923 In order to provide for the absence of a Sessions Judge we think it is necessary to empower him to make a general order authorising the Additional Sessions Judge to exercise all his powers We have provided for it specifically by this amendment'—*Report of the Select Committee of 1916*

WHO CAN REPORT —The only Courts which can make a reference to the High Court are the Court of Session and District Magistrate An Additional Sessions Judge has jurisdiction to exercise the powers of a Sessions Judge only in respect of cases transferred to him by the Sessions Judge—23 A W N 28 But a Joint Magistrate cannot exercise the powers of the District Magistrate—14 W R

If he thinks fit —These words indicate that the District Magistrate or the Sessions Judge is not bound to refer every case in which he may detect an error—20 W R 40

WHEN REFERENCE MAY BE MADE —A District Magistrate should refer all cases in which he considers the order of the Subordinate Court as illegal—2 Weir 664 When a Sessions Judge considers that the judgment or order is contrary to law, or that the punishment is severe he may report the proceedings to the High Court—20 W R 60 1 A W N 12 Where a District Magistrate is of opinion that a subordinate Magistrate has no jurisdiction to try a particular case, the District Magistrate has no power to quash the proceedings of the Sub-Magistrate but must report the case for proper order to the High Court—21 MAD 340 So also if a Sessions Judge is of opinion that an order of a District Magistrate ordering a further enquiry under sec 436 is wrong a reference to the High Court may be made under this section—22 CAL 573 A Sessions Judge cannot upon examining the monthly criminal return of a Magistrate order further inquiry under sec 436 into the case of a person who has been *convicted* If he thinks any further inquiry necessary he should refer the case to the High Court—Ratanlal 407

WHEN REFERENCE CANNOT BE MADE —(1) This section allows a reference only when the Court of Session is of opinion that the judgment or order is contrary to law, or that the punishment is too severe or inadequate but not on the ground of the insufficiency or incredibility of the evidence—1 A W N 12 17 C P I R 36, 18 W R 7

(2) A necessity for altering a conviction from one section to another for cognate offence when the accused has not been prejudiced by any such error is not sufficient ground for a reference to the High Court for the exercise of its revisional jurisdiction—9 CAL 847

(3) When a District Magistrate or Sessions Judge had himself power to make the order which he proposed in his letter of reference a reference under this section is unnecessary—28 CAL 102 Thus a case which regularly comes to the Sessions Judge on the appeal of a prisoner cannot be referred to the High Court under this section but must be disposed of by the Sessions Judge—9 W R 5 11 W R 24, 1914 P W R 7, 13 A L J 477 15 Cr L J 472 (MAD), 2 Weir 565 Where the accused was charged with theft and discharged by the first class Magistrate and the District Magistrate referred the case to the High Court it was held that the High Court need not

interfere in a case of a mere discharge the District Magistrate being competent to take steps himself should he deem it necessary—Ratanlal 290

(4) Where an appeal is preferred to the Sessions Judge he cannot without disposing of the appeal under sec. 423 make reference to the High Court under this section—1 A W N 130

(5) A reference can be made if the District Magistrate is of opinion that there is a case for revision upon examining the record of the Sub Magistrate's proceeding and not merely on the representation of the complainant against the Subordinate Magistrate's decision—Ratanlal 340, nor a reference can be made merely on the report of a Jail Darogha—11 A W N 80

Reference in cases of acquittal—In the case of an acquittal by a Subordinate Magistrate if the Government does not appeal the proper course for the District Magistrate if he is dissatisfied with an order of acquittal would be to move the Local Government for exercising its powers under sec. 417 and not to make a reference to the High Court under this section—22 A W N 89 The High Court will not ordinarily entertain a reference from the District Magistrate in such cases—24 ALL 346 1907 P W R 13, 25 ALL 428, 6 C L R 215, 44 CAL 703, 15 MAD 36 19 W R 55 1910 M W N 517 12 A J J 255 12 B L R APP 22 35 M L J 665 38 MAD 1028

Reference in Police Proceedings—This section does not empower a District Magistrate to refer to the High Court the proceedings of a Superintendent of Police as the latter is not a Court subordinate to the Magistrate—Ratanlal 133

POWER TO REFER PROCEEDINGS OF SUPERIOR COURT

—The powers of the Sessions Judge or District Magistrate under this section are limited by sec. 435 which speaks of proceedings of an *inferior Criminal Court* (as to which see notes under sec. 435) and therefore the District Magistrate has no power to question the propriety of an order of the superior Court (Sessions Judge's Court) and to refer the matter to the High Court—28 ALL 91 41 BOM 47 6 C L R 245 23 CAL 250 23 O C 392 2 N L R 149, 36 ALI 378, 10 ALI 116 The Magistrate's power of making a reference is restricted to the records and proceedings of Courts subordinate to him and so a Magistrate cannot ask a Sessions Judge to report a case to the High Court in which he thinks that the acquittal on appeal by the Sessions Judge was wrong—2 A W N 135 It is never intended that a Subordinate Court should have the power of questioning the

propriety of an order passed by an Appellate Court for revision simply on the ground that it considers that the original sentence was a proper sentence and should not have been reduced—1 CAL 875 If the District Magistrate thinks that there has been a miscarriage of justice in an appeal heard by the Sessions Judge he should not report the case to the High Court for orders under Sec 438 but should communicate with the Public Prosecutor and invite his attention to it—9 ALL 62 1 S L R 10 15 CAL 189 6 BOM L R 1000 Ratnabal 601, Ratnabal 621

POWER TO RE-RISE QUESTION OF LAW—This section empowers the Sessions Judge and District Magistrate on examining the record of any proceeding under sec 435 to report to the High Court for order *the result of such examination* which means that the Sessions Judge or District Magistrate is to report the incorrectness or illegality of the sentence or order and not that he should refer abstract points of law to the High Court—1 O C 416 There is no provision of law which enables a Judge to stop a trial already commenced and to refer to the High Court any questions of law arising on the merits in the case—Ratnabal 211 When a Sessions Judge *after having* asked the opinion of the assessor in a case tried before him made a reference to the High Court on a question whether he had jurisdiction or not the High Court held that the Sessions Judge ought to have disposed of the question himself and that this section was never intended to be used for the purpose of sending questions to the High Court for opinion—2 ALL 771 See also O S C 71 The reference by the Sessions Judge in the Bombay and Allahabad cases cited above was contrary to the law for another reason viz that it was not made in respect of any proceedings of a Subordinate Court but in respect of a proceeding of his own Court

POWER TO TAKE EVIDENCE—Neither section 435 nor this section enables the District Magistrate or Sessions Judge to take further evidence with a view to reporting the case—3 BOM L R 677 12 A L J 461

CONTENTS OF THE REFERENCE—(1) A Sessions Judge before he refers the case to the High Court is bound to call upon the inferior Court for an explanation of the order passed and should submit such explanation to the High Court together with the record—8 CAL 614

(2) The reasons for the reference should accompany the record—11 A W N 80

(3) The order of reference should set forth points on which orders are required—O S C 64*

(4) The reference should contain a recommendation that the sentence be revised or altered—27 ALL 25, and the Magistrate should also give a brief abstract of the case and the grounds upon which he recommends that the order or sentence he considers to be incorrect should be set aside by the High Court—9 Cr J J 302 (MAD)

But the report should not contain any representation of the complainant protesting against the Subordinate Magistrate's decision—Ratanlal 340

SUSPENSION OF SENTENCE—RELEASE ON BAIL—When a District Magistrate is not competent to make a reference (*e g* a District Magistrate is not competent to refer the proceedings of a Sessions Judge) he cannot admit the accused to bail—18 CAL 186

The accused can be released on bail only where the report contains a recommendation that the sentence be revised or altered. When no such recommendation is made the accused cannot be admitted to bail—23 W R 40

HIGH COURT'S POWER IN DEALING WITH REFERENCE

Where a District Magistrate referred a case tried by a Subordinate Magistrate and recommended the setting aside of the order of Sub Magistrate being of opinion that the trying Magistrate did not honestly and impartially apply his mind to the actual evidence before him and took a grossly biased and distorted view of the case it was held that it would not be right for the High Court to take the expression of opinion of the District Magistrate, and to rely upon that opinion without satisfying itself upon the evidence and upon the conduct of the proceedings generally that the District Magistrate's opinion was right that is the High Court would have to investigate the whole of the facts before it would come to the conclusion whether it ought to interfere in revision—44 CAL 703

439. (1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may in its discretion exercise any of the powers conferred on a Court of Appeal by sections * * 423, 426 427, and 428 or on a Court by section 338 and may enhance the sentence and when the Judges composing the

Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under section 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed, than might have been inflicted for such offence by a Presidency Magistrate or a Magistrate of the first class.

(4) Nothing in this section applies to an entry made under section 274 or shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

(6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction.

CHANGE.—In sub-section (1) the figure "195" has been omitted this is consequential upon the amendment made in sec 195. Sub-section (6) has been newly added.

SCOPE OF SECTION.—The series of sections 435-439 must be read together. Of these sections 435 is the principal section dealing with the grounds upon which revisional jurisdiction may ordinarily be exercised—15 CAL 608. Secs 435-438 prescribe the method by which the records of any Criminal case come to the High Court and the power of the High Court to deal with the record is in Sec 439. Secs 435-438 provide the machinery and Sec 439 gives the power to dispose of the record—36 MAD 275. The words "the record of which has been called for by itself" refer to sec 435, and the words "which has been reported for orders" refer to sec 438.

Section 439 must be read along with and subject to section 435, if a case is outside the scope of section 435, section 439 cannot apply to it—47 CAL 438.

'Any proceeding' not necessarily a judicial proceeding —Under the old Code of 1872 the words used in this section were 'judicial proceeding' instead of the words 'any proceeding' and the High Court could call for and revise the record of a *judicial* proceeding only, but under the Code of 1882 (as well as under the present Code) the High Court can call for and examine the record of *'any proceeding'* e.g. an order by a Magistrate under sec 317 below—2 Weir 538

High Court should not be moved in the first instance —See notes under section 435

WHEN HIGH COURT WILL INTERFERE IN REVISION — The controlling power of revision of the High Court in Criminal cases is an extraordinary power and it must be exercised with regard to the circumstances of each particular case anxious attention being given to the said circumstances which vary greatly. The discretion ought not to be crystallized as it would become in course of time by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion which the Legislature has committed to them. This discretion like all other judicial discretions ought as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case—25 BOM 533 No hard and fast limitation should be placed on the exercise of the powers of superintendence of the High Court over the proceedings of inferior Courts. There is no species of injustice which the High Court would be powerless to correct under the Charter, where its interference is called for—14 M J, T 200 19 C W N 678

(1) Sections 435 and 439 give the High Court power to control the propriety as well as the legality of a finding sentence or order of any inferior Criminal Court. That necessarily imports a power to regulate or revise the proceedings leading up to any such finding sentence or order. If therefore a sentence has been passed or confirmed by a Court which could not legally try or should not properly have tried the case the High Court has a discretion to interfere—9 N L R 81

(2) When an illegal order is passed and action taken which involves matters coming within the purview of law and justice and within the scope of authority of the Courts such authority cannot be ousted by the mere *ipse dixit* of the officer that he was not acting as a Judicial officer but in his executive capacity and the High Court can interfere in revision—1908 P R 1

(3) The High Court can interfere in revision on the ground of misreading of documentary evidence and fundamental errors in principle which vitiate the conduct and disposal of the case—23 BOM 479

(4) The High Court will interfere with an order of a Magistrate passed without jurisdiction under a certain Act even though that Act provides that the conviction under it shall not be open to appeal or revision—2 S L R 20 Thus although sec 15 of the Extradition Act ousts the jurisdiction of the High Court to inquire into the propriety of a warrant issued under Chapter III of that Act, yet where the order was made clearly without jurisdiction, it is open to revision by the High Court at the instance of the party whose liberty is affected by it—11 Cr L J 673 (CAL) 7 BOM L R 163

(5) The High Court can exercise its power of revision even after the expiry of the sentence and though it is not possible to interfere with the sentence because it has expired the law does not prevent the High Court from interfering with the conviction—7 ALL 135

(6) The High Court has the power and the right to call for the record of a case and make such order thereon as it deems just, *even though the applicant is dead*—2 BOM 561 [Contra—1893 P R 8, where it was held that an application for revision abates on the death of the applicant] Sec 191 (as amended in 1898) allows an appeal from a sentence of fine after the death of the appellant, and similarly the High Court can exercise its power of revision even after the death of the applicant in a case where compensation has been awarded under section 250 such compensation being in the nature of a fine—1908 P R 21 see also 1919 P R 8 cited under sec 431

(7) The High Court has ample power to interfere should it see fit to do so in any case in which the Magistrate has either refused to exercise a discretion vested in him by the law or has exercised that discretion in an improper manner or on improper grounds—19 CAL 52 2 CAL 110 So also where the Magistrate acted in his character as Magistrate believing he had power to do so, whereas in fact he had no such power, his act is liable to be set aside in revision upon the application of the party aggrieved—1866 P R 21, 1870 P R 4

(8) The High Court can in revision reverse the proceedings of a Magistrate on the ground of disqualification in the Magistrate in a particular case, owing to personal or pecuniary interest or bias—1881 P R 40

(9) The High Court can interfere in revision where the procedure followed by the Magistrate has been most improper and faulty, *e g*, where the evidence was not recorded then and there but was taken subsequently at the spot—24 W R 14, or where the Magistrate negligently omitted to record evidence of previous conviction and convicted and sentenced the accused—1874 P R 12, 1884 P R 36, 1874 P R 13, 1879 P R 28, or where the inquiry in the Lower Court has been faulty—12 BOM 377

(10) The High Court will interfere in revision when there is a *material error* in the proceedings, which means not an error in decision upon the facts, but some *error in law or procedure* which affects the decision—20 W R 41 Thus, where there is a substantial doubt as to the guilt of the accused it is a material error not to give the accused the benefit of the doubt and the High Court can interfere and acquit the accused—1916 P W R 27, 1915 P W R 34, 1875 P R 6 Where the Court has taken a wrong view of the facts through an error of law *e g*, where it places the burden of proof on the accused contrary to the principles laid down in sec 101 of the Evidence Act the High Court will interfere—Ratanlal 794 Where the evidence for the prosecution was weak and biased and it was possible that the accused did the act complained of (theft) under a *bona fide* belief that he had the right to do so, it was an error of law of the Magistrate not to have acquitted him, and in revision the Chief Court set aside the conviction—1916 P W R 27, 18 Cr L J 732 (CAL) An improper summing up by the Sessions Judge in which the Judge omitted to charge the jury as to the degree of credit to be given to a particular witness is an error in law which is a good ground for revision—5 W R 80 It is a material error to convict a person of being in possession of stolen property in the absence of evidence showing dishonest possession on the part of the accused especially where the theft is not recent—1875 P R 15 Omission to take a very material evidence offered by the accused is a material error which prejudices the accused, and the High Court can interfere—24 W R 60 Laxity and indifference on the part of the Sessions Judge in weighing and sifting the evidence is a material error which calls for revision—2 ALL 336 A defective investigation by the Magistrate is a material error which justifies interference of the High Court in revision—2 Weir 570

(11) The High Court will interfere where the order of the Lower Court was passed without recording sufficient evidence Where the

exclusion on record was insufficient to support a conviction. The High Court in revision set aside an order of the Sessions Judge summarily rejecting the appeal, and referred the case for rehearing on the merits.—19 C. W. N. 416.

The High Court will also interfere where the Lower Court has failed to consider important evidence and has accepted certain other evidence without any critical examination.—23 C. W. N. 188.

(2) The High Court can interfere with an order in a Criminal case on the ground that interference unfavorable to the accused and not warranted by the evidence has been drawn to the prejudice of the accused.—18 Cr. L. J. 116 (R.I.I.).

HOW POWERS OF HIGH COURT CAN BE INVOKED.—The High Court will interfere either by calling for the record under sec. 435 or when the case has been reported to it for orders under sec. 441 or when the case otherwise comes to its knowledge. The High Court may interfere in revision upon information in whatever way received.—2 M.A.L. 18. The powers conferred by this section are at all times to be exercised and they may be put in force not merely on matters coming before the Judge in Court but also on matters coming to his knowledge on reliable information.—2 Weir 538. An official communication from Government for revision of a case is covered by the terms of this section and the High Court can exercise its revisional powers when a case comes to the knowledge of the Court through an official communication direct from Government.—7 A. W. N. 111.

Although the Court has power under sec. 439 of the Code to call for cases not only on judicial information but also to deal with a case which otherwise comes to its knowledge, yet in most circumstances it is a right practice that the Judges should be moved in open Court.—Ratanlal 577. 16 BOM. 780.

The High Court may exercise its power of revision upon the petition of a private person occupying the position of a complainant in the case in which revision is sought.—2 M.A.D. 18. 2 M.L. 418, 2 S. L. R. 25. 1 P. L. J. 145.

The High Court may also exercise its power on its own initiative.—1912 P. W. R. 7. 2 BOM. 761.

In case of acquittal the High Court can exercise its powers of revision on the application of a private prosecutor.—2 M.L. 118. Though as a Court of Appeal the High Court can consider an order of acquittal only on the appeal of the Local Government, yet as a

Court of revision, it can deal with an original or appellate order of acquittal either when reported under sec 438 or whenever it may otherwise come to its knowledge. It can do so even on the application of a private prosecutor—27 CAL 320. See also 38 CAL 786, 18 C W N 1244, 25 C W N 609, 1915 P W R 18, 6 S L R 121, where the High Court entertained an application for revision preferred by the private complainant against the order of acquittal. The High Court ought to interfere with an order of acquittal at the instance of a private complainant especially in a case like defamation where the offence is of so personal a nature that the Local Government would seldom be willing to appeal from the acquittal—20 Cr L J 708 (NAG), so also in a case of insult—11 C L J 113.

Contra—5 N I R 4 and 24 ALL 346 where it is held that the High Court has no power to revise an order of acquittal, except at the instance of the Local Government. Where no appeal has been preferred by the Local Government, an application for revision by a private prosecutor should be discouraged on public grounds—14 MAD 363, 2 Weir 571, 3 BOM 150, 15 S L R 171. It is not proper and expedient for the High Court as a general rule to exercise its powers of revision against orders of acquittal on a reference direct from the District Magistrate under sec 438 where the Local Government has not appealed from the order of acquittal—24 ALL 346, 44 CAL 703, 25 ALL 128, 12 B L R App 22, 35 M L J 665.

WHEN HIGH COURT WILL NOT INTERFERE IN REVISION

—(1) In the exercise of its revisional powers the High Court will not interfere in revision unless it is satisfied that it is necessary to do so to prevent an otherwise irreparable injustice—9 BOM L R 706, 20 A L J 909.

(2) The High Court will not interfere in revision if no prejudice is shewn to have resulted to the accused—1906 P R 5, 4 L B R 315. The High Court will not interfere even though the Court below is wrong in law or the trial in the Court below is illegal (and not merely irregular) if the accused has not been prejudiced by such error—1913 P W R 29, 4 BOM L R 686, 1906 P R 5. Thus where a case has been properly disposed of on the merits by the Court below the High Court will not interfere in revision merely on the ground that the pleader on behalf of the accused was not heard in the Lower Court—1 PAT 589.

(3) The High Court will not interfere when there is no error in law or in the face of the record—4 BOM L R 686.

(4) The revisional powers of the High Court will not be exercised until all the other remedies (*e.g.*, appeal) provided by law have been exhausted—4 A W N 293, 3 CAL 573, 2 ALL 276, 25 A W N 143 See notes under sub-section (5)

(5) The High Court will not interfere in revision when the accused has pleaded guilty, except as to the extent or legality of the sentence—27 A. W N 201, 4 L B R 315

(6) The High Court will not interfere in revision when there has been long delay in applying for revision and the delay is not explained or accounted for by the applicant—27 ALL 168, 8 ALL 514, 6 ALL 484, 27 A W N 204, 6 A W N 83 I P L J 165

(7) The revisional jurisdiction of the High Court will not be exercised in such a way that a right of appeal may practically be given in cases where such right is definitely excluded by the Code—33 ALL 403

(8) The High Court will not allow a revision application when a remedy can be easily obtained from the Civil Court—6 C W N 469.

ORDERS WHICH ARE SUBJECT TO REVISION —(1) *Orders of a Presidency Magistrate* —Under secs 423 and 139 the High Court has jurisdiction to set aside an order of discharge passed by a Presidency Magistrate and to direct that the person improperly discharged should be committed for trial—27 BOM 84 20 C W N 1128 In 27 CAL 126 it has been held that the High Court can interfere with an order of dismissal or discharge passed by a Presidency Magistrate, not under this Code, but under sec 15 of the Charter Act

(2) *Non-appealable orders* —The High Court's power of revision is not limited to orders from which an appeal would lie. On the other hand, the High Court ought to rectify cases of injustice or illegality when the person affected is unable to appeal. The High Court in revision can exercise its power of appeal with reference to any particular order whether appealable or not—1885 P R 42

(3) *Order granting bail* —The proceeding in which it has to be determined whether the accused person should be admitted to bail is a judicial proceeding and is therefore cognizable by the High Court as a Court of Revision—6 MAD 63 But in another Madras case it has been held that where a Sessions Judge finding that there was no reasonable ground for believing that the accused was guilty released him on bail under sec 497, the High Court would not interfere with such order in revision, though it has power to do so—10 M L J,

411 In the same case White C J doubted whether the High Court had any power at all to revise at all-order

(4) *Order refusing to grant copies*—Where the Magistrate refused to grant to the accused the copies of papers which were necessary for his defence the High Court in revision set aside the conviction on that ground—14 W R 77

(5) *Preliminary or final order*—It is competent to the High Court to call for the record of any proceeding in an inferior Criminal Court and if necessary or expedient to revise any order passed by such Court whether of a preliminary or final nature—14 A L J 851, 12 A W N 102 23 Cr L J 429 (LAH) Thus where a District Magistrate called upon a witness who gave evidence before him to show cause why he should not be prosecuted for perjury the High Court was competent to revise such order—14 A L J 851

So also where a Magistrate after dismissing a complaint without inquiry passed an order calling upon the complainant to show cause why he should not be prosecuted for bringing a false complaint the High Court revised the preliminary order though no final order directing the prosecution of the complainant had yet been passed—22 Cr L J 81 (ALL)

(6) *Orders under Sections 88 106 110 118 143 144 145 148 476 488 514 515 517* see notes under those sections

ORDERS WHICH ARE NOT OPEN TO REVISION—*Order under the Press Act*—An order under sec 8 Press Act (Act I of 1910) for the deposit of security by the publisher of a newspaper is not revisable by the High Court—17 C W N 1245 so also an order under sec 3 (1) of the Press Act—39 MAD 1085

(2) *Order under the Extradition Act*—The Chief Court has no power under this section to interfere in respect of a warrant issued by a Political Agent in a Native State under Sec 7 of the Extradition Act (XV of 1903) either on the ground that there is no *prima facie* case against the petitioner or on the ground that the circumstances under which the officer was originally moved do not justify him to exercise his power under the said Act—1908 P W R 36 Where a warrant is issued by a Political Agent under sec 7 of the Extradition Act its execution by the District Magistrate in accordance with the Act is an executive act and the High Court cannot interfere in revision with such execution But the High Court can interfere otherwise than by way of revision e.g. under sec 491—42 CIL 793

(3) *Orders of the High Court itself*—The judgment of the Division Bench of the High Court coupled with the sentence is final, and the Court is *functus officio* as soon as the judgment is signed by the Judges, and the High Court or any Bench of it has no power to revise the sentence or interfere with it in any way—14 CAL 42 Also a Division Bench cannot revise an order of a single Judge of the High Court—1909 P B 4, 1909 P R 1 See notes under sec 369 The only exception is in a case under sec 131 See notes under that section, and 1909 P B 1 cited therein

POWERS OF THE HIGH COURT IN REVISION—*Powers of an Appellate Court*—Sec 439 enumerates the powers which the High Court may exercise in revision and it declares that in any proceeding the record of which has been called for by itself or reported for orders or otherwise comes to its knowledge or on an application made by the complainant the Court may in its discretion exercise any of the powers conferred on a Court of Appeal by certain preceding sections, among others by sec 423—27 BOM 84 2 AIL 336 4 P L J 435 The nature of the powers that the High Court has in revision is the same as that which a Court of Appeal has in the case of an appeal from any order against which an appeal is allowed by Code—14 M L T 200 A Sessions Judge or a District Magistrate cannot while sitting in revision exercise the powers conferred by the Code on an Appellate Court Appellate powers are in revision conferred by sec 439 on the High Court—20 CAL 633 But the High Court sitting as a Court of revision will not exercise the powers of an Appellate Court except on very exceptional grounds—8 BOM 197 Specially in cases where no appeal is allowed by the law the High Court will not in revision exercise the powers of an Appellate Court except on very exceptional grounds—Ratanlal 244 9 BOM L R 706 The revisional jurisdiction of the High Court may be exercised in order to prevent gross and palpable failure of justice but it should not be exercised in such a way that a right of appeal may practically be given in cases where such right is definitely excluded by the Code—36 AIL 403 The High Court must not allow what would virtually be an appeal from the order of the Lower Court in a non appealable case—10 N L B 177

The High Court as a Court of revision has the power conferred on a Court of Appeal by sec 423 *to alter or reverse* an order of the Lower Court—16 CAL 730 The High Court has also power *to alter a conviction* for one offence into a conviction for another offence, at the same time maintaining the sentence passed—7 A W N 95, *e g*,

where the accused was convicted by a Magistrate for an offence triable exclusively by the Court of Session, the Chief Court interfered in revision and altered the conviction to one for an offence triable by a Magistrate—1869 P R 10 The High Court can *quash the proceedings* where there was an utter want of discretion on the part of the Magistrate in instituting the proceedings—1 C L R 268, where no advantage would be gained by continuing the proceedings—16 A L J 731 The High Court *quashed a conviction* where it was not supported by any legal evidence e.g. when the only evidence was the admission of a co accused—1868 P R 14 The High Court can set aside a conviction where it was based on an erroneous view of the law—27 CAL 320 But in setting aside a conviction which is bad in law, the High Court is not necessarily bound to go further into the question where upon the facts established by the evidence a conviction of some lesser offence might or might not be recorded—41 ALL 587 But the High Court cannot interfere and set aside a valid conviction and sentence passed by a Court of competent jurisdiction after careful consideration—21 W R 47, 1884 P R 36, 20 W R 61

The High Court in revision has power to order a retrial—5 M H C R App 10 But the High Court cannot, as a Court of revision, set aside the conviction and sentence passed by a Magistrate of competent jurisdiction with a view to direct a retrial on the ground that subsequent to the conviction it becomes known that the accused was previously convicted—1884 P R 30 Where evidence of the previous conviction of the accused for a similar offence was not adduced at the trial, the High Court refused to interfere in revision and to order a retrial to enable the prosecution to supplement the record by producing fresh evidence bearing on the question of punishment—1905 P R 19

The High Court when acting as a Court of Revision, can *order a committal* for trial to the Court of Session after reversing the finding and sentence—15 ALL 205 Where the evidence discloses a more serious offence not within the jurisdiction of the Magistrate, the High Court may *quash the conviction and sentence* for the minor offence and direct a commitment for trial before a tribunal having jurisdiction for the graver offence—7 M H C R APP 5, 20 C W N 732, 23 C W N 1031 Where the accused has been improperly discharged, the High Court has power to set aside the order of dis-

charge and to direct that the person improperly discharged be arrested and forthwith committed for trial—27 BOM 84, 6 ALL 40

The High Court has power under this section to set aside an order of commitment if it is bad—2 ALL 398

Power to direct further evidence to be taken—Under this section the High Court has power to direct further evidence to be taken—3 BOM L R 677, 19 W R 56 The High Court under sec 439 has powers as an Appellate Court to direct evidence to be taken No such powers are given to the Sessions Judge or the District Magistrate under sec 436—6 C L J 251 Where a Magistrate omitted to set out in the charges the previous conviction of the accused, the Chief Court in revision directed that the charge should be amended by adding the previous conviction and also directed that evidence with regard to these convictions should be recorded—1879 P R 19, 1879 P R 28

The High Court has also power under this section to call for additional evidence upon which the High Court can itself come to a conclusion but this section does not give the High Court power to call for a finding of the Magistrate—17 Cr L J 767 (MAD)

Power to go into facts—The High Court in revision is not confined to questions of law alone but can also deal with questions of fact—14 A W N 207 20 A L J 276 If the Judges in revision think it right to consider the whole evidence they have power to do so—14 CAL 361 Ratanlal 908

The High Court can go into facts—(1) When the Lower Court has totally misconceived the evidence and come to an obviously wrong conclusion—14 BOM 115 (2) The High Court can go into the facts of the case where evidence which is not admissible has been wrongly admitted (1 P L R 121) and the evidence is not considered from the right point of view e.g. where the evidence of accomplice was regarded as that of ordinary witnesses—2 C W N 672 (3) Where the construction of a document upon which the guilt or innocence of the accused largely depends is erroneous the High Court has power to go into the facts fully—1905 P R 12 (4) Where evidence against the accused is weak suspicious and inconclusive the High Court can, on its revision side, examine and discuss the evidence on record and upset the findings of fact of the Lower Courts—1907 P W R 20 (5) Where the Lower Courts have failed to scrutinize carefully the proof of corroboration of accomplice evidence, the High Court in revision entered into the evidence and set aside the concurrent findings of fact

of both the Lower Courts—1911 P W R 3 (6) The High Court as a Court of Revision, has power to re-examine the evidence if there are *prima facie* good grounds for doing so, especially where the accused has been given a non-appealable sentence and has no means of vindicating his character except in revision—19 Cr L J 666 (NAG)

Where the judgment of the Appellate Court is a meagre one and shows that the Appellate Court has not gone thoroughly into the questions dealt with at the trial by the first Court, the High Court will in revision investigate the original trial to see whether the nature of the procedure and the decision arrived at were such as to leave no doubt that the accused had a fair trial and that the decision was given according to law—20 Cr L J 370 (ALL)

But though the High Court has power to revise findings of fact arrived at by the Lower Courts and the law imposes no limits to this jurisdiction, (11 BOM 331, 10 CAL 1047, 10 BOM 131), still it is not bound to do so, if it does not think fit, and will not exercise such a discretionary power unless there appears on the face of the judgment or order complained of on the record some ground to induce the Court to think that the evidence ought to be examined in order to see that there has been no failure of justice—22 CAL 908 It is unusual in revision to disturb a finding of fact unless it is so manifestly erroneous that a miscarriage of justice would result from its being uncorrected—6 BOM L R 1096, 9 O L J 488 The High Court has the power to go into evidence in revision, but it is the practice of the High Court not to go into evidence as a rule, and the Court will not interfere unless there are special circumstances or unless there is an error of law—28 BOM 533, Ratanlal 244 The uniform practice of the High Court is not to exercise its power of upsetting a finding of fact, except for some extraordinary reason, and the circumstance that the High Court itself might have come to a different conclusion is not such a reason—14 BOM 115 The High Court in revision will not interfere with a finding of fact of the Lower Court where the decision of that Court on the facts is not shewn to be clearly or manifestly wrong—14 BOM 331, 18 Cr L J 437 (CAL) The High Court will refuse to interfere in the exercise of its revisional jurisdiction with regard to findings of fact, except on very exceptional grounds such as a misstatement of evidence by the Lower Court or the misconstruction of documents, or placing by that Court on the accused onus of proof contrary to the law of evidence—12 BOM L R 21 The jurisdiction of the High Court to go into question of facts

should be exercised in very exceptional cases such as where there has been a conviction of a clearly innocent person—8 BOM L R 851. When the High Court sets aside a conviction as being bad in law, it is not necessarily bound to go further into the question whether upon the facts established by the evidence a conviction of some lesser offence might or might not be recorded—41 ALL 587.

Power to allow composition —The High Court as a Court of Revision has power to give effect to the compounding of offences which the parties had agreed to after conviction—1901 P L R 232, 32 ALL 153, 15 ALL 17. Where the parties have lawfully compounded the offence the High Court may set aside the conviction—13 O C 161. This is now expressly provided by the new subsection (1A) of Section 315 added by the Amendment Act of 1921. In 18 C W N 1212, 43 CAL 1113 1 P L R 158 19 MAD 601 11 A L J 13 15 A L J 467 1918 P R 35 it was held that the High Court had no power to allow composition in revision. These cases are no longer good law.

Power to order restoration of property —The High Court in its revisional jurisdiction has the power under section 421 (d) of making any amendment or any consequential or incidental order that may be just and proper. An accused person may upon his acquittal by the High Court in revision be restored to possession of property of which he has been deprived in favour of the complainant—27 ALL 415. The High Court may in the exercise of its revisional powers pass an order under Sec 317 to refund the money received by false pretences—15 Cr L J 553 (Rur).

Power to dismiss complaint —Where the facts stated in a complaint disclose no criminal offence the High Court in revision can at once direct that the complaint be dismissed—1913 P W R 10.

Power to consider case of non-appealing accused —Where two or more persons have been convicted by the Sessions Judge and one of them has appealed the High Court has power under Sec 439 to deal with the case of the accused persons not appealing against their conviction while considering and trying the appeal preferred by the other accused, clause (5) of this section does not in any way affect the jurisdiction of the High Court to deal with the case of the non-appealing accused—5 C W N 330, 31 C L J 305 13 A W N 51, 1916 P W R 7, 1909 P W R 14. Where four persons were convicted and three of them were awarded non-appealable sentences and on appeal by the other the conviction of all of them was found to be wrong, the High Court had power under this section to deal with and

set aside the conviction even as regards those who have not appealed—11 A W N 149, 39 ALL 549, 31 C L J 305 Similarly where there are several convicted persons and one only of them has applied for revision, the High Court has power to deal with the convictions of all offenders who were tried together and convicted, though only one person has applied for revision—1909 P R 9, (1911) 2 M W N 170

Power to expunge remarks from Lower Courts' Judgment—A Sessions Judge in convicting the accused passed certain remarks about the complainant, a police officer, as a result of which he was dismissed from service. He thereupon applied to the High Court to delete the remarks from the judgment of the Sessions Judge. It was held, dismissing the application that it would be an extraordinary exercise of the powers of the High Court, to expunge from the lower Courts' judgment the remarks complained of—19 BOM L R 912. The High Court cannot do so even under section 123 (d) read with section 439 because the 'amendment' mentioned in the section 123 (d) means an amendment of the main order, and the incidental or consequential order means an order incidental to and consequential upon the main order, that is, the High Court can make an amendment or pass an incidental or consequential order only when there has been an appeal or revision petition against the main order, but where the main order passed by the lower Court has not been appealed against the High Court cannot entertain any application for expunging certain remarks made by the lower Court in its judgment—44 ALL 401. But where there has been an appeal or revision petition against the order of the lower Court the High Court in dealing with the whole evidence of the case and considering the judgment can expunge any improper remarks made in it by the Court below. This will be evident from 2 C W N 15, 15 Cr L J 120 (Oudh) and 5 BUR L T 20. In 4 BUR L T 173, the Chief Court held that it had power to expunge the objectionable passages from the lower Courts judgment though it refused to do so. See also notes under section 561A.

Power to interfere in a pending case—The High Court can, under the powers conferred by this section interfere with interlocutory orders passed in a case—20 BOM 534. The High Court is competent at any stage of a case to interfere in order to exercise its powers of revision—38 CAL 68. It has jurisdiction to interfere at any stage of criminal proceedings pending before a Subordinate Court if it considers that such interference is required in the interests of justice—

29 MAD 561 The High Court can interfere with the proceedings of a Magistrate while they are in the interlocutory stage pending investigation and may suspend such proceedings, even without having the record before it—20 W R 23 The High Court can, pending trial, interfere with the interlocutory order of a Magistrate refusing to summon certain witnesses for the defence—1901 P L R 130 The High Court can interfere pending trial when the Subordinate Magistrate improperly declines to record any evidence tendered—1901 P L R 257 The High Court can interfere and set aside an interlocutory order of a Magistrate refusing to let in evidence—8 S L R 238 Where the trial was a vexatious and protracted one, and material injury was thereby likely to be caused to the accused, the High Court interfered and set aside the charge—39 MAD 561 Where it was brought to the notice of the High Court that a person has been subjected over two months to the harassment of an illegal prosecution it was the duty of the High Court to interfere—22 CAL 131 Where it was found that proceedings were instituted against a person under sec 110 for the third time though on both the previous occasions he was acquitted and no new evidence was forthcoming the High Court interfered and quashed the proceedings—1910 P R 33, 2 A L J 673 Where the notice and interlocutory order of a Magistrate under Sec 112 were defective and could not form the basis of a proceeding under sec 110, the High Court interfered and set aside the proceedings so far taken by the Magistrate—1910 P W R 18

But though the High Court has power to interfere with pending proceedings at any stage it will not do so except only under rare and exceptional circumstances—25 CAL 233 1 S L R 30 39 MAD 561, and unless there is some manifest and patent injustice apparent on the face of the proceeding and calling for prompt redress—26 CAL 786 20 Cr L J 761 21 Cr L J 313 (NAG.) The High Court will allow the proceedings in the Subordinate Court to go on and take their course and will not interfere with a pending proceeding unless there is exceptional ground for interference—25 CAL 233 20 Cr L J 30 (CAL.) Thus the High Court will not interfere with the conduct of a case on the ground that the written complaint did not fully describe the offence if the complainant stated in his deposition the description of such offence—19 A W N 212 The High Court will interfere with a pending trial only when it is satisfied that an interference is necessary and that postponement of the rectification

of the error will cause waste of time or a miscarriage of justice—1901 P R 8

POWER TO ENHANCE SENTENCE—This is a power which is not conferred s sec 423 and the High Court can exercise this power, not as an Appellate Court but only in revision. Thus in an appeal against a conviction by a prisoner, the High Court dismissed the appeal as an Appellate Court but enhanced the sentence as a Court of Revision—11 CAL 530

The High Court has power to enhance a sentence so as to alter its nature—6 ALL 622. The effect of secs 423 and 439 read together is that the High Court when hearing an appeal against a conviction may alter the finding under sec 423 and then as a Court of Revision may enhance the sentence under this section so as to make the sentence appropriate to the altered finding—37 MAD 119. Thus, where a Sessions Judge convicted the accused of culpable homicide not amounting to murder and sentenced him to seven years rigorous imprisonment, the High Court in revision altered the conviction to one of murder and sentenced him to transportation for life—1871 P R 11.

But an enhancement of sentence is a serious proceeding and the High Court will not interfere as a Court of Revision in order to enhance the sentence if the sentence passed by the Lower Court involves substantial punishment and should interfere only if the sentence is manifestly inadequate—1889 P R 7, 1898 P R 17. 10 S L R 207. The mere fact that the High Court would have inflicted a heavier punishment if the case had come before it for trial is not a proper ground of enhancement of sentence—1919 P R 7. It is not merely because circumstances occur to the Magistrate which would render necessary a more severe sentence or a different charge that the High Court will interfere there must be matter on the record of the case showing that the charge has been improperly framed or that the sentence passed is clearly inadequate to the offence—20 W R 22.

Where evidence of previous conviction was not adduced at the trial but was discovered after the conviction the High Court will not interfere and order a retrial in order to enable the prosecution to supplement the record by producing fresh evidence bearing on the question of punishment—1905 P R 19, 1884 P R 36, 1905 P R 43. Similarly, a valid conviction arrived at by the Magistrate will not be set aside simply because subsequent to the trial and conviction fresh evidence has been discovered which may tend to convict the

accused of an offence other than that for which he was convicted—21 W R 47

The High Court will not interfere in revision to enhance the sentence when the convicted person has undergone the full term of imprisonment or has paid the fine imposed upon him even though the order of the Court below is clearly wrong in law—1913 P W R 29, 1909 P W R 14, 1 LAH 131 The High Court is slow to interfere in cases where interference would involve the imprisonment of persons already discharged from jail—1889 P II 7 The power of enhancement under this section should not be exercised in cases where the Magistrate's order was proper on the materials before him, and it is not fair to the accused to reverse the conviction and direct him to be committed to the Sessions after he has undergone the full term of imprisonment inflicted by the Magistrate because his previous convictions were not known at the time of his trial by the Magistrate—9 S L R 95

In cases that come up before the High Court for enhancement of sentence, it is the practice of the Court to accept the conviction as conclusive and to consider the question of enhancement of sentence on that basis—32 BOM 162 9 S L R 82 When however it is proposed to enhance a sentence beyond the limit of the powers of the trying Magistrate this practice should not be followed Therefore, before a Court of Revision enhances the sentence beyond that term, it should satisfy itself whether the conviction is correct—9 S L R 82

The power of enhancement conferred on the High Court under sec 439 is limited only by clause (3) of this section This clause does not regard the difference in the powers of the trying Magistrate under sec 32, but lays down that in cases of sentences passed by Magistrates not empowered under sec 34 the limit of enhancement shall be the sentence that might have been inflicted by a Presidency Magistrate or a Magistrate of the first class Therefore the High Court has power to enhance the sentence of imprisonment to two years—9 S L R 82 The High Court has the power to inflict any punishment which might have been inflicted for the offence by a first class Magistrate and is not limited to the powers of the trying Magistrate—1 LAH 453 The words 'enhance the sentence' presuppose that a sentence has been imposed by the Lower Court Therefore where no sentence is passed but the accused is released on probation under sec 362 of the Code, the High Court cannot substitute a sentence of

imprisonment or whipping in revision—20 Cr L J 99 (Oudh), 27 ALL 31

Lastly, the power of enhancement of sentence can be exercised under this section where the sentence is a legal one. A sentence of imprisonment for the period already passed by the accused in the local up is not a legal sentence—1919 P R 27

PROCEDURE IF TWO JUDGES DIFFER—If two learned Judges of the High Court differ in a Criminal Revision Case sec 439 read with sec 429 requires the case to be decided by a third Judge, and precludes any further appeal under the Letters Patent or any reference to a Full Bench under the rules of the Court—40 MAD 976. But where an application is made to the High Court not under section 435 of the Criminal Procedure Code but under section 107 of the Government of India Act Section 439 of the Code cannot apply, and consequently Sec 429 (which is referred to in sec 439) is also not applicable and therefore if in such a case there is a difference of opinion between the Judges the provisions of sec 36 of the Letters Patent will apply and the decision of the senior Judge will prevail—47 CAL 438

SUBSECTION (2)—NOTICE TO ACCUSED—In the case of proceedings called for solely with a view to enhance the sentence, notice to that effect should be given to the accused and to the District Magistrate—Ratanlal 179. Where a complainant applied to the High Court under sec 439 to revise an order of a first class Magistrate ordering payment of compensation (under sec 250) to the accused the High Court refused to pass any order where it appeared that the accused was dead and could not therefore be served with notice—Ratanlal 634

A High Court may by virtue of sec 429 issue a warrant of arrest without previous notice to the accused because a warrant of arrest is not an order to the prejudice of the accused within the meaning of this subsection—8 L B R 290

But an enhancement of sentence is an order to the prejudice of the accused and no order of enhancement should be made without hearing the accused—22 C W N 168

SUBSECTION (5)—INTERFERENCE WITH ORDERS OF ACQUITTAL—As to the powers of the High Court to revise orders of acquittal at the instance of a private prosecutor or on a reference under sec 438 see notes under heading 'How powers of High Court can be invoked above

Though the High Court has power to interfere in revision with an order of acquittal yet ordinarily it does not interfere with such order in the exercise of its revisional jurisdiction. Because an appeal can always be made to the Local Government under sec. 417 of the Code—15 BOM 341, 16 Cr L J 32 (Oudh); 2 Weir 70, 1907 P W R 13 (overruling 1905 P W R 170). When no appeal has been preferred to the Government against an order of acquittal applications for revision should be discouraged on public grounds—2 Weir 71, 11 MAD 263, 42 CAL 612, 3 BOM 150, 18 Cr L J 812 (per Huda J). But Tennon J. in this case and in 42 CAL 612 remarked that to lay down as a hard and fast rule that application by complainants for revision of orders of acquittal are to be discouraged is for the High Court to abdicate its functions and in present conditions in India must necessarily result in denial of justice.

Though the High Court has jurisdiction to interfere in revision with an acquittal it shall ordinarily exercise this jurisdiction sparingly and only in serious cases where it is urgently demanded to prevent a gross miscarriage of justice—19 A L J 589, 13 M L J 369, 12 CAL 612, 1915 M W N 411, 19 MAD 263, 19 A L J 382, 6 ALLJ 481, 41 BOM 500, 1 H R (1917) 2nd Qr 13. Thus the High Court will interfere on the application of a private complainant where a Magistrate acquitted the accused disregarding the uncontradicted evidence and facts admitted which proved the guilt of the accused and acted illegally in trying a warrant case as a summons case—15 M L J 225. The High Court will interfere in revision and set aside an acquittal where the acquittal is the result of an alleged composition which turns out to be invalid—21 Cr L J 120. The High Court will not hesitate to interfere where the acquittal is based on a manifest error in law appearing on the face of the judgment—9 BOM L R 156, 6 A L J 758, 1 ALL 189. The High Court will interfere where the order of acquittal was not passed on the merits but was made on account of the death of the complainant—1 P L J 264. The High Court can in revision set aside an order of acquittal passed by the Lower Court where the judgment of that Court is very summary and contains no discussion of the case or distinct findings on the questions involved—18 Cr L J 519 (CAL). Where there were grave irregularities in procedure and the trial was conducted in an atmosphere of prejudice, the High Court interfered with an order of acquittal and set it aside—25 C W N 609 (*Reed's case*). The High Court will interfere in certain exceptional circumstances where

a matter of public importance is involved—24 O C 57 The only cases where it is at all appropriate that revision application at the instance of private parties against orders of acquittal should be entertained are those in which there has been a failure of justice through want of jurisdiction or a failure to understand the law applicable to the case, or perhaps in personal cases such as those under sec 504 or 197 of the I P Code—U B R (1917) 2nd Qr 19 An application for revision against an order of acquittal may appropriately be allowed, when legal points alone are involved—1918 P R 8 The High Court ought to interfere with an order of acquittal at the instance of a private complainant when the offence is of so personal a character (e g defamation insult) that the Local Government will seldom be willing to appeal from the acquittal—20 Cr L J 708 (NAG) 11 C L J 113 But the mere fact that the High Court if it was sitting as a Court of Appeal would have come to a different conclusion of fact is no ground for exercising revisional jurisdiction upon petition against order of acquittal—39 MAD 505, 5 N L R 4 It is only when the acquittal is illegal for some such reason as is given in sec 530 (p) or where an incurable irregularity has occasioned a failure of justice that the High Court can interfere—5 N L R 4 2 L W 1244 The High Court should not interfere with an order of acquittal when the question is merely as to the appreciation of doubtful evidence and there is no patent error or defect in the order of acquittal passed by the Lower Court resulting in grave injustice—39 MAD 505, 35 M L J 518 The above remarks equally apply to cases of revision against an order of discharge under sec 203 and the High Court would be unwilling or very reluctant to interfere with an order of discharge based on the consideration of all the prosecution evidence when no evidence has been shut out and there is no illegality or irregularity in the procedure adopted by the trying Court even if the High Court should on the materials on the record consider that it was a fit case for the framing of a charge and putting the accused on his defence—35 M L J 518

The High Court has power in revision to reverse an order of acquittal but cannot convert a finding of acquittal into one of conviction—9 ALL 134 44 ALL 332, 5 W R 2 After reversing the order of acquittal the proper order of the High Court must be one directing the retrial of the proceedings—9 ALL 134 22 Cr J 97 (ALL), 19 A L J 589 Though the High Court in exercising revisional powers against orders of acquittal can go into questions

of fact, still it cannot then and there convict but can only order retrial—1908 P W R 22

The only way of securing conviction in a case of acquittal is by an appeal by the Local Government against the order of acquittal—14 ALL 332

An order under sec 471 is not an order of conviction Therefore where the accused was acquitted by the Lower Court on the ground that he was insane the passing of an order under sec 471 by the High Court in revision does not amount to an alteration of an order of acquittal into one of conviction within the meaning of this sub-section—42 M L J 72

The 'acquittal contemplated by this sub-section is a complete acquittal on all the facts and allegations charged and not an acquittal on one charge and conviction on another Therefore, where the accused has been convicted by the Magistrate of one offence and acquitted of another, in the same trial the High Court has power in revision to convert the acquittal into conviction—1904 P R 12 Sub section (4) of sec 439 refers to a case where the trial has ended in a complete acquittal and not to a case where the trial has ended in a conviction but the Court has wrongly applied the law or has wrongly found some fact not proved and has in consequence held that the conviction should be under some section of the Code other than the section properly applicable—37 MAD 119

This sub-section does not limit the powers of a Court of Appeal It is intended to limit in certain respects the revisional powers of the High Court which would otherwise have been competent in revision to convert a finding of acquittal into one of conviction A Court of Appeal has no such restriction—37 MAD 119 23 CAL 975

SUB SECTION (5)—*Revision where right of appeal exists*—Under this sub-section the High Court is precluded from exercising powers of revision at the instance of the accused who had a right of appeal and did not exercise it—8 BOM L R 851 3 CAL 573 1 C L R 352 2 ALL 276 1904 P L R 1 44 M L J 366, 35 BOM 233, 8 S L R 229 14 S L R 173 But there is no inflexible rule that where the accused has a right of appeal and does not exercise it the High Court cannot exercise its revisional powers under this section but such powers should be sparingly used and in very exceptional circumstances—6 ALL 454 In as much as this sub-section directs that where an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of

the party who could have appealed, it is clearly desirable that District Magistrates should not place difficulties in the way of persons entitled to appeal by calling for the proceedings and taking action upon them within the period allowed for appeal—17 B R (1916) 3rd Qr 124

This subsection prohibits the High Court from exercising its power of revision at the instance of the party who could have appealed, but it is no bar to dealing in revision with a case reported under sec 438 by the Sessions Judge or District Magistrate—1904 L B R 209

No appeal after revision —Where a case has been heard in revision and orders have been passed after the High Court fully went into the facts of the case the Court cannot afterwards hear an appeal in the same case—10 A W N 225

No revision after appeal —Although the High Court is competent to interfere in revision as well as to interfere on appeal still it could not have been the intention of the Legislature that a person, who has appealed and has had the opportunity of advancing any objection it desires to take to the proceedings of the Lower Court should again have the opportunity of raising any points of law he may have omitted to raise in the appeal by an application for revision—2 Weir 573 But the High Court after it has acted as a Court of Appeal may act as a Court of revision on special grounds *e.g.* to correct an error which cannot be set right by appeal For instance if a man should be found guilty of murder and sentenced to 7 years transportation then if the prisoner should appeal on the facts the High Court might uphold the finding of guilty of murder on appeal and afterwards as a Court of revision might set aside the sentence of 7 years transportation and pass a legal sentence for murder—5 W R 45

MISCELLANEOUS —*Limitation* —According to the practice of the High Court an application for revision in Criminal cases must be presented within 60 days from the date of the order complained of, exclusive of the time necessary for obtaining copies This is not however an inflexible rule and in exceptional circumstances the rule may be departed from—43 CAL 1029

Finding of fact —It is the practice of the High Court (Allahabad) in revision unless very strong ground for an opposite conclusion is found to exist to take the findings of the Lower Appellate Court and not of the first Court, as the facts of the case—18 Cr L J 435 (ALL)

New plea in revision —An accused cannot be heard to urge a new plea entirely inconsistent with the one already raised by him during the trial and so he could establish that the case for the prosec-

cution would not be believed and there is an element of doubt in it, in which case the benefit of doubt must be given to the accused—18 Cr L J 435 (M.L.)

Loss of record —The loss of a record after conviction is no ground for the acquittal of the accused in revision. In serious cases where the accused has been convicted and sentenced to a substantial punishment, it may be that a re-trial may be ordered—18 Cr L J 737 (PAT)

Rule to shew cause—construction —A rule which is issued by the High Court in revision should be read with the judgments which were before the Court at the time it was granted, and should be read reasonably in favour of the accused—2 C W N 81

How to shew cause —A Magistrate who is called upon by the High Court to shew cause against a rule issued by the High Court must ask the Legal Remembrancer to appear for him and must not address the Registrar of the High Court by letter—4 CAL 20

Duty of Magistrate showing cause —Though it is open to a Magistrate called upon to shew cause to submit his remarks in answer to the ground urged by the petitioner who obtained the rule, it is not open to him to submit observations with a view to supplement or add to his judgment—7 C W N 89

440. No party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision.

Optional with Court to hear parties

Provided that the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader, and that nothing in this section shall be deemed to affect section 439, sub-section (2)

SCOPE OF SECTION —The rule in this section is the general rule provided by the Legislature and it must be taken as a legislative reversion of the general principle that persons are entitled to be heard before any order affecting them to their prejudice can be made—10 CAL 268. Under this section it is open to the High Court to determine the question raised by a rule without hearing the counsel or pleader for or against the rule—10 C L J 80. The High Court can deal with the question whether the District Magistrate has properly exercised his power under sec 437, without giving notice to the accused or allowing him an opportunity of being heard—10 CAL 268.

The provisions of this section apply only to revision and do not apply to the summary rejection of an appeal under Sec 421 of this Code—12 C W N 248 This section also does not apply to sec 439 (2), that is, if an order is passed to the prejudice of the accused he must be heard either personally or by pleader

NO RIGHT TO BE HEARD —The accused is not entitled to be heard when an order under sec 136 is made directing further enquiry into a summary rejection of complaint—15 CAL 608 (see also the other cases cited under Sec 436) The High Court refused to hear counsel who appeared to support a petition for the revision of an acquittal—11 MAD 363 In a reference under Sec 438 a counsel is not entitled to appear against the report—1BOM 64 A private prosecutor cannot be allowed to appear on a reference to the High Court under sec 438 If he is heard at all he can be heard only with the permission of the Court—14 W R 51

But by virtue of the discretionary power given by the proviso the High Court always hears counsel in matters of importance—19 CAL 380, 6 A L J 237

441. When the record of any proceeding of any Presidency Magistrate is called for by the High Court under section 435, the grounds of his decision to be considered by Magistrate may submit with the record a statement setting forth the grounds of his decision or order and any facts which he thinks material to the issue, and the Court shall consider such statement before overruling or setting aside the said decision or order

A statement filed under this section takes away any irregularity in the proceedings of a Magistrate caused by the omission to record reasons before referring a case under sec 202 or dismissing a complaint under sec 203—5 M L T 79

A statement submitted by a Presidency Magistrate under this section must be regarded as a completion of the record and possesses a conclusive character as against affidavits—12 BOM 337

This section does not abrogate the terms of section 263 or 370 and a Bench of Presidency Magistrates imposing a sentence of imprisonment for an offence must record their reasons for the conviction The omission to do so in a case where no record of the evidence was taken is a grave irregularity But having regard to the reasons for conviction submitted by the Presidency Magistrates under this section,

the High Court will not set aside the order of the Bench solely on the ground of the irregularity—44 M L J. 84

442. When a case is revised under this Chapter by the High Court, it shall, in manner herebefore provided by section 425, certify its decision or order to the Court by which the finding, sentence or order revised was recorded or passed, and the Court or Magistrate to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified; and, if necessary, the record shall be amended in accordance therewith.

SCOPE OF SECTION —This section deals with every case which is revised under this chapter by a High Court, in other words, it applies to all revisions, whether under sec 135 or sec 430 and it provides that it shall certify its decision or order to the Lower Court, but it contains no such provision that it will certify its decision to itself. This shows that the High Court cannot revise any judgment passed by itself—1909 P R 4

PART VIII.

SPECIAL PROCEEDINGS

CHAPTER XXXIII

SPECIAL PROVISIONS RELATING TO CASES IN WHICH EUROPEAN AND INDIAN BRITISH SUBJECTS ARE CONCERNED

This chapter has been added by the Criminal Law Amendment Act 1923. "The procedure for the trial of cases in which racial considerations are involved is included in a new chapter which takes the place of the old Chapter XXXIII of the Code

"As regards the new Chapter XXXIII it will be observed that it applies to offences punishable with imprisonment which are alleged to have been committed outside a presidency-town. The first step to be taken to secure that such a case shall be tried under the provisions of the Chapter is a claim to be made by the accused person before the Magistrate. Unless such a claim is made at one of the stages indicated for the trial of a summons-case or of a warrant case, or for the in-

quiry preliminary to commitment, the provisions of the Chapter will not apply. The Magistrate then makes such inquiry as he thinks necessary. As a guide to the Magistrate in coming to a finding as to whether the case should be tried under the provisions of the Chapter or not it is provided that if the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects he shall find that the case should be tried under the provisions of the Chapter. For other cases with which both European British subjects and Indian British subjects are connected the Magistrate must be satisfied that it is expedient for the ends of justice that the case shall be so tried. This it is observed is the same criterion as that now contained in clause (e) of subsection (1) of section 326 of the Code of Criminal Procedure relating to the powers of a High Court to transfer criminal cases. If the Magistrate rejects the claim the person has a right of appeal to the Sessions Judge whose decision is final and if the claim is rejected by the Magistrate the Magistrate is required to stay the proceedings until the expiration of the period allowed for the presentation of the appeal or if an appeal is presented until it has been decided. The period allowed for the presentation of an appeal is fixed by Article 150A of the Indian Limitation Act, 1908 at seven days. The persons who will be included within the term 'complainant' for the purpose of these provisions are then defined by the proposed section 444. Incidentally public servants and officers and servants of companies, associations or bodies to which the local Government by general or special order may declare the provisions of the section to apply will not be included within the definition merely because they have made a complaint or given information in their official or "quasi official capacity". The procedure in summons cases punishable with imprisonment is then laid down. For warrant cases which would normally be triable under the provisions of Chapter XXI of the Code if it is found that the case ought to be tried under the provisions of the Chapter a Magistrate is required if he does not discharge the accused to commit the case for trial to the Court of Session whether the case is or is not exclusively triable by that Court. Normally in the Court of Session the case will then be tried by a jury of mixed nationality the majority of the jurors being either Indians or Europeans and Americans according as the accused person is an Indian or a European subject of His Majesty.—*Statement of Objects and Reasons* Para 11

443. (1) *If here, in the course of the trial outside a presidency-town of any offence punishable with imprisonment, the accused person, at any time before he is committed for trial under S 213 or is asked to show cause under S 242 or enters on his defence under S 256, as the case may be, claims that the case ought to be tried under the provisions of this Chapter, the Magistrate inquiring into or trying the case, after making such inquiry as he thinks necessary, and after allowing the accused person reasonable time within which to adduce evidence in support of his claim, shall if he is satisfied—*

- (a) that the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects or*
- (b) that in view of the connection with the case of both an European British subject and an Indian British subject, it is expedient for the ends of justice that the case should be tried under the provisions of this Chapter, record a finding that the case is a case which ought to be tried under the provisions of this Chapter, or, if he is not so satisfied, record a finding that it is not such a case*

(2) *Where the Magistrate rejects the claim, the person by whom it was made may appeal to the Sessions Judge, and the decision of the Sessions Judge thereupon shall be final and shall not be questioned in any Court in appeal or revision*

(3) *Where the Magistrate rejects the claim, he shall stay the proceedings until the expiration of the period allowed for the presentation of the appeal or, if an appeal is presented, until it has been decided*

This section has been framed on the lines recommended by Para 27 of the Racial Distinctions Committee Report

444. *For the purposes of S 443, "complainant" means any person making a complaint or, in relation to any case of which cognizance is taken under clause (b) of S 190, sub-section (1), any*

Definition of "complainant"

person who has given information relating to the commission of the offence within the meaning of S 154

Provided that a Public Prosecutor, a public servant, a member, officer or servant of any local authority, a railway servant as defined in S 3 of the Indian Railways Act, 1890, or an officer or servant of any company, association or other body to which the Local Government may, by general or special order published in the local official Gazette, declare the provisions of this section to apply, shall not, by reason only of the fact that he has made a complaint of, or given information of, an offence in his capacity as such Public Prosecutor, public servant, railway servant, member officer or servant, be deemed to be a complainant within the meaning of this section, nor shall a police officer be so deemed by reason only of the fact that a report under S 173 relating to a case has been made by or through him

This section has been added by the Bill and did not exist in the Report of the Racial Distinctions Committee

445. (1) Where a Magistrate or a Sessions Judge decides under S 443 that a case ought to be tried under the provisions of this Chapter and the case is a summons case, the Magistrate trying the same shall direct that the case be referred to a Bench of two Magistrates and shall send a copy of such order to the District Magistrate who shall forthwith provide for the constitution of a Bench of two Magistrates of the first class, of whom one shall be an European and the other an Indian for the trial of the case

(2) Where the Magistrates constituting the Bench by which a case is tried under this section differ in opinion, the case, together with their opinions thereon, shall be laid before the Sessions Judge, who may examine any party or recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall thereafter pass such judgment, sentence or order in the case as he thinks fit and as is according to law

(3) Any person convicted by a Bench under this section shall have the same right of appeal as if he had been convicted by a Magistrate of the first class, and any person convicted by a Sessions Judge under sub-section (2) shall

have the same right of appeal to the High Court as if he had been convicted by the Sessions Judge at a trial held by the Sessions Judge under this Code

(4) *In any case in which it is impracticable to constitute a Bench in accordance with the provisions of sub-section (1) in any district, the District Magistrate shall transfer the case for trial by a local Bench to such other district as the High Court may, by general or special order, direct*

(5) *Notwithstanding anything contained in this section, the Local Government may, by notification in the local official Gazette, direct that all summons-cases tried under the provisions of this chapter in any district specified in the notification shall be tried as if they were warrant-cases in accordance with the provisions hereinafter in this Chapter laid down for the trial of warrant-cases*

Subsections (1) to (4) of this section embody the recommendations contained in para 28 of the *Racial Distinctions Committee Report*

As regards subsection (5) the reason is thus stated by the framers of the Bill "The local Governments and High Courts were consulted on these proposals of the Committee (i.e. as regards the new section 445) from the opinions received it is clear that in many areas in India these proposals will be impracticable and it is considered that in any case the adoption of the procedure proposed for similar warrant cases (see 446) namely commitment to and trial in a Court of Sessions by jury would not be more expensive than the proposals of the Committee Accordingly it is proposed (in analogy with powers given to Local Government by sec 269) to permit Local Governments to direct that in particular districts such cases shall be triable according to the provisions laid down for the trial of similar warrant cases"

—*Statement of Objects and Reasons Para 6*

446. (1) *Where a Magistrate or a Sessions Judge decides under S 443 that a case ought to be*
 Procedure in warrant cases *tried under the provisions of this Chapter and the case is a warrant-case, the Magistrate inquiring into or trying the case shall, if he does not discharge the accused under S 209 or S 253, as the case may be, commit the case for trial to the Court of Session, whether the case is or is not exclusively triable by that Court*

(2) *Where an accused is committed to the Court of Session under sub-section (1), the Court shall proceed to try*

the case as if the accused had required to be tried in accordance with the provisions of S 275, and the provisions of that section and the other provisions of Chapter XXIII, so far as they are applicable, shall apply accordingly

Provided that where the trial before the Court of Session would in the ordinary course be with the aid of assessors and the accused, or all of them jointly, require to be tried in accordance with the provisions of S 284 A, the trial shall be held with the aid of assessors all of whom shall, in the case of European British subjects, be persons who are Europeans or Americans or, in the case of Indian British subjects, be Indians

This section embodies the recommendation of the Racial Distinctions Committee contained in Para 27 of their Report

447. *If at any stage of an inquiry or trial under this Code it appears to the Magistrate that the case is or might be held to be a case which ought to be tried under the provisions of this Chapter, he shall forthwith inform the accused person of his rights under this Chapter*

448. *For the purpose of the trial in Rangoon of any person under the provisions of this Chapter, references to the Sessions Judge shall be construed as references to the High Court in Rangoon*

449. (1) Where—

Special provisions relating to appeal

- (a) a case is tried by jury in a High Court or Court of Session under the provisions of this Chapter, or
- (b) a case which would otherwise have been tried under the provisions of this Chapter is under this Code committed to or transferred to the High Court and is tried by jury in the High Court, or
- (c) a case is tried by jury in the High Court in a presidency-town and the High Court grants leave to appeal on the ground that the case would, if it had been tried outside a presidency-town, have been triable under the provisions of this chapter,

then, notwithstanding anything contained in S 418 or S

423, sub-section (2), or in the Letters Patent of any High Court, an appeal may lie to the High Court on a matter of fact as well as on a matter of law.

(2) Notwithstanding anything contained in the Letters Patent of any High Court, the Local Government may direct the Public Prosecutor to present an appeal to the High Court from an original order of acquittal passed by the High Court in any such trial as is referred to in sub-section (1)

(3) An appeal under sub-section (1) or sub-section (2) shall, where the High Court consists of more than one judge, be heard by two judges of the High Court.

See Para 7 (h) and (c) of the Statement of Objects and Reasons

450-463. * * * *

Sections 453 454 455 and 459 are now re enacted as sections 528A, 528B 528C and 528D respectively. Sections 456 458 are incorporated in secs 491 and 491A. section 460 is included in section 284A, sub-section (2). section 462 is now merged in section 426. The remaining sections are repealed

CHAPTER XXXIV

LUNATICS

464. (1) When a Magistrate holding an inquiry or a trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defence the Magistrate shall inquire

Procedure in case of accused being lunatic

into the fact of such unsoundness and shall cause such person to be examined by the Civil Surgeon of the district or such other medical officer as the Local Government directs and thereupon shall examine such Surgeon or other officer as a witness and shall reduce the examination to writing

(1) Pending such examination and inquiry the Magistrate may deal with the accused in accordance with the provisions of S. 466

(2) If such Magistrate is of opinion that the accused is of unsound mind and consequently incapable of making his defence, he shall record a finding to that effect and shall postpone further proceedings in the case

CHANGE —Sub-section (1A) and the italicised words in sub-section (2) have been added by the Cr. P. Code Amendment Act, 1923

in the course of his examination under Sec 364, the accused said that he was not in his senses when he tried to rob it was held that the Court of Session should have acted under this Section and tried the fact whether on the date the accused was called upon to plead he was or was not of unsound mind and capable or incapable of making his defence—15 A L J 239 When the accused committed to the Sessions appears to be of unsound mind the Sessions Judge is bound to try the fact of insanity first and should not try it along with the trial for the offence—25 A W N 2

DOUBTFUL CASES —Where a Court entertains doubts as to the sanity of the accused, the Court should not merely put questions to the accused, but should try the fact of such unsoundness of mind by examining the Civil Surgeon or some other medical officer, and by taking such evidence as might have been procurable from the village at which the accused resides with the view of ascertaining whether the accused had at any time prior to the commission of the crime exhibited symptoms of sanity—1 B H C R 33

Where in a doubtful case the Sessions Judge convicted the accused, the High Court set aside the conviction and ordered an inquiry under this Section before retrial on the charge—1905 P R 51 Where on a reference for confirmation of sentence of death the High Court entertained doubts as to the accused's sanity the case would be referred to the Sessions Judge for further inquiry—2 W R 33

POSTPONEMENT OF TRIAL —Where the prisoner is found to be insane the Sessions Judge should postpone the trial and proceed under sections 460 and 467, instead of proceeding with the trial and acquitting the accused—9 W R 23 1 W R 11 3 W R 70 3 W R 57

A Sessions Judge has no power to stay proceedings and direct an enquiry to be made into the state of the accused's mind because it appears to him problematic whether the accused is capable of making his defence The proper procedure to be followed is that prescribed in Secs 465 and 466—2 Weir 582

SUBSECTION (2) —The preliminary inquiry held under this section is not a *trial* in the sense of ascertaining whether the accused is *guilty* or not of the offence charged—3 P L J 291

456. (1) Whenever an accused person is found to be of unsound mind and incapable of making his defence the Magistrate or Court
Release of lunatic
pending investigation
or trial his defence the Magistrate or Court

as the case may be *whether the case is one in which bail may be taken or not* may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when summoned before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf.

(2) If the case is one in which bail may not be taken, or if sufficient security is not given, the Magistrate or Court shall report the case to the Local Government remanding the accused to custody pending orders and the Local Government may order the accused to be confined in a lunatic asylum, jail or other suitable place of safe custody and the Magistrate or Court shall give effect to such order.

(2) *If the case is one in which, in the opinion of the Magistrate or Court, bail should not be taken or if sufficient security is not given, the Magistrate or Court, as the case may be, shall order the accused to be detained in safe custody in such place and manner as he or it may think fit and shall report the action taken to the Local Government.*

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Local Government may have made under the Indian Lunacy Act 1912.

CHANGE.—In sub-section (1) the words "whether the case is one in which bail may be taken or not" have been substituted for the words "if the case is one in which bail may be taken." Sub-section (2) has been entirely redrafted and a proviso added. "This section is so amended as to allow bail to be granted at the discretion of the Court in any case in which the accused is a lunatic and the amendment also permits the accused to be kept in custody. The object in view is to delegate the power of the local Government, and to do away with the existing distinction in procedure between bail-

able and non-bailable cases"—*Statement of Objects and Reasons* (1911)

Where a Magistrate or Sessions Judge instead of proceeding under this section, tries the accused and acquits him on the ground of insanity, the order of acquittal is illegal—2 A W N. 106, 10 W. R. 37, 9 W. R. 23, 3 W. R. 70

When the accused is confined in a lunatic asylum or jail or some other place of safe custody according to the order of the Government, the Magistrate's power over the accused ceases from such confinement, and he cannot release him on security later on. He can deal with the accused only if the accused is sent back to him under sec 473 on a certificate that the accused is capable of making his defence—2 CAL 356. But under the present section as amended the Court itself will have power to detain the insane accused in a place of safe custody, and in such a case it will not cease to have control over the accused, but will be able to release him on sufficient security being given.

467. (1) Whenever an inquiry or a trial is postponed under S 464 or S 465 the Magistrate or Court, as the case may be, may, at any time resume the inquiry or trial and require the accused to appear or be brought before such Magistrate or Court.

(2) When the accused has been released under S 466, and the sureties for his appearance produce him to the officer whom the Magistrate or Court appoints in this behalf, the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence.

When a trial is postponed under sec 465 on the ground of insanity of the accused it should not be resumed at the point at which it was previously stopped, but should be commenced *de novo*, when the Court finds him capable of making his defence—2 Weir 582

468. (1) If, when the accused appears or is again brought before the Magistrate or the Court, as the case may be, the Magistrate or Court considers him capable of making his defence, the inquiry or trial shall proceed.

(2) If the Magistrate or Court considers the accused to be still incapable of making his defence the Magistrate or Court shall again act according to the provisions of section 464

or section 462, as the case may be, of the account of fund-
tally of various and acceptable of reading by defence
of the fund and account in accordance with the provisions
of section 462.

CHANGE -The real and virtual thickness of the section have been added by the C. P. C. American & Apr. 1923. This amendment is consequential on the amendment of sec. 4.

The inquiry established that the evidence was not sufficient to establish the same.

469. When the accused appears to be of sound mind at

[illegible]

The Magistrate shall proceed as follows:—Where the Magistrate is of opinion that the accused is of sound mind at the time of trial but was of unsound mind at the time of committing the crime, the Magistrate at the trial shall record an order that the accused is of sound mind at the time of trial but was of unsound mind at the time of committing the crime.

A Magazine is not a newspaper, and it is not a book, when he finds to be true as the first, and second, and third, although at the time, it is not a book, and it is not a book. W. R. 23

Whenever a Magistrate is asked to send for trial before the Court of Sessions a person regarding whose sanity at the time of commission of the offence there exists any doubt, he shall at the same time inform the Sessions of the supposed state of the accused in order that he may be placed under careful surveillance prior to his trial before the Court at Sessions—BOMBAY H. C. Cr. Cir. p. 12

PRESUMPTION —The law presumes every person who has attained the age of discretion to be sane unless the contrary is proved, and where a lunatic has lucid intervals, the law presumes the

able and non-bailable cases.—*Statement of Objects and Reasons* (1914)

Where a Magistrate or Sessions Judge instead of proceeding under this section tries the accused and acquits him on the ground of insanity the order of acquittal is illegal—2 A W N 106 10 W R 37 9 W R 23 3 W R 70

When the accused is confined in a lunatic asylum or jail or some other place of safe custody according to the order of the Government, the Magistrate's power over the accused ceases from such confinement and he cannot release him on security later on. He can deal with the accused only if the accused is sent back to him under sec 473 on a certificate that the accused is capable of making his defence—2 CAL 356 But under the present section as amended the Court itself will have power to detain the insane accused in a place of safe custody and in such a case it will not cease to have control over the accused but will be able to release him on sufficient security being given.

467. (1) Whenever an inquiry or a trial is postponed under S 464 or S 465 the Magistrate or Court as the case may be may, at any time resume the inquiry or trial and require the accused to appear or be brought before such Magistrate or Court.

(2) When the accused has been released under S 466, and the sureties for his appearance produce him to the officer whom the Magistrate or Court appoints in this behalf the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence.

When a trial is postponed under sec 465 on the ground of insanity of the accused it should not be resumed at the point at which it was previously stopped but should be commenced *de novo* when the Court finds him capable of making his defence—9 Weir 582

468. (1) If when the accused appears or is again brought before the Magistrate or the Court as the case may be the Magistrate or Court considers him capable of making his defence the inquiry or trial shall proceed.

(2) If the Magistrate or Court considers the accused to be still incapable of making his defence the Magistrate or Court shall act according to the provisions of section 461.

or section 465, as the case may be *and if the accused is found to be of unsound mind and incapable of making his defence shall deal with such accused in accordance with the provisions of section 466*

CHANGE —The italicised words at the end of the section have been added by the Cr P C Amendment Act 1923. This amendment is consequential on the amendment of sec 466.

The inquiry or trial should commence *de novo*. See 2 Weir 582 cited under sec 467.

469. When the accused appears to be of sound mind at the time of inquiry or trial, and the Magistrate is satisfied from the evidence given before him that there is reason to believe that the accused committed an act which, if he had been of sound mind would have been an offence, and that he was at the time when the act was committed, by reason of an unsoundness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law the Magistrate shall proceed with the case and if the accused ought to be committed to the Court of Session or High Court, send him for trial before the Court of Session or High Court as the case may be.

The Magistrate shall proceed with the case" etc —Where the Magistrate is of opinion that the accused is of sound mind at the time of trial but was of unsound mind at the time of committing the offence the Magistrate cannot discharge the accused on that ground but should proceed under secs 470 and 471—2 Weir 582.

A Magistrate can commit an accused to the Sessions whom he finds to be sane at the time of the preliminary investigation although at the time of committing the offence he was insane—9 W R 23.

Whenever a Magistrate acting under this section shall send for trial before the Court of Session an accused person regarding whose sanity at the time of committing the offence he entertains any doubt, he shall at the same time inform the civil authorities of the supposed state of the accused in order that he may be placed under careful surveillance prior to his trial before the Court of Session—BOM H C Cr Cir p 18.

PRESUMPTION —The law presumes every person who has attained the age of discretion to be sane unless the contrary is proved, and where a lunatic has lucid intervals, the law presumes the

offence to have been committed during such interval, unless it is proved that the act was committed during mental derangement—
Ratanlal 172

470. Whenever any person is acquitted upon the ground that, at the time at which he is alleged to have committed an offence he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.

ACQUITTAL ON GROUND OF LUNACY—The fact of unsoundness of mind must be clearly and distinctly proved before any jury is justified in pronouncing a verdict of acquittal under sec 84 I P C Every man is presumed to be sane until the contrary is proved—20 W R 70, Ratanlal 172 Where the prisoner killed his brother-in-law apparently without any enmity or quarrel and the only motive given out by the prisoner was that he might be hanged by the authorities and go to heaven, it was held that the opinion of a medical witness as to the state of the accused's mind would be necessary—2 Weir 583

If the Magistrate finds that the accused is of sound mind at the time of trial, but was suffering from temporary insanity while he committed the offence, he should not discharge the accused, but acquit him and proceed under this section and sec 471—2 Weir 582, 17 C P L R 113

471. (1) Whenever the finding states that the accused person committed the act alleged the Magistrate or Court before whom or which the trial has been held, shall, if such act would, but for the incapacity found, have constituted an offence, order such person to be detained in safe custody in such place and manner as the Magistrate or Court thinks fit, and shall report the action taken to the Local Government

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Local Government may have made under the Indian Lunacy Act, 1912

(2) The Local Government may empower the officer in charge of the jail in which a person is confined under the provisions of S. 466 or this section, to discharge all or any of the functions of the Inspector General of Prisons under S. 473 or S. 474.

CHANGE.—The word '*finding*' has been substituted for the word '*judgment*,' and the word '*detained*' for the word '*kept*'; the words "and shall report the action taken to the Local Government" and the proviso have been newly added by the Cr. P. C. Amendment Act, 1923.

Previously, the words at the end of sub-section (1) were "and shall report the case for orders of the Local Government," so that the Court could not itself send the accused to a lunatic asylum or jail but had to report the case to the Local Government, and the latter gave orders for sending the accused to an asylum or jail. See 43 BOM. 144. But those words have been omitted by the Repealing and Amending Act X of 1914, and its effect is that Magistrates and Courts are no longer required to report cases for the order of the Local Government but are themselves competent to direct the detention of the accused in an asylum or jail or some other place prescribed for the reception of Criminal lunatics—8 L. B. R. 200, 22 O. C. 269. But it does not deprive the power of the Government to detain the accused in some other place of custody under the provisions of the Indian Lunacy Act (IV of 1912). The Government have powers, in spite of this section, to decide the future fate of the lunatic—25 BOM. L. R. 286.

This section does not compel the Court to send the accused to the lunatic asylum, all that is necessary to see is that such safeguards are taken as would keep him from mischief—42 M. L. J. 72.

Where the Court below while acquitting an accused on the ground of insanity omitted to pass orders under section 471, the High Court in revision can pass the necessary orders—*Ibid*.

If a person is acquitted under section 470 he ought not to be made over to his relatives for safe custody but should be detained in custody under this section—2 Weir 350. But the Local Government can deliver the lunatic to the custody of his relatives under sec. 475.

472. [*Repealed by the Indian Lunacy Act, 1912.*]

473. If such person is detained under the provisions of S 466, and in the case of a person detained in a jail, the Inspector General of Prisons, or, in the case of a person detained in a lunatic asylum the visitors of such asylum or any two of them shall certify that, in his or their opinion such person is capable of making his defence he shall be taken before the Magistrate or Court as the case may be at such time as the Magistrate or Court appoints, and the Magistrate or Court shall deal with such person under the provisions of S 468 and the certificate of such Inspector General or visitors as aforesaid shall be receivable as evidence

The word *detained* has been substituted for *confined* and the italicised words have been added

474. (1) If such person is *detained* under the provisions of S 466 or S 471, and such Inspector General or visitors shall certify that, in his or their judgment he may be *released* without danger of his doing injury to himself or to any other person the Local Government may thereupon order him to be *released*, or to be detained in custody or to be transferred to a public lunatic asylum if he has not been already sent to such an asylum and in case it orders him to be transferred to an asylum may appoint a Commission consisting of a judicial and two medical officers

(2) Such Commission shall make formal inquiry into the state of mind of such person taking such evidence as is necessary and shall report to the Local Government which may order his *release* or *detention* as it thinks fit

The word *detained* has been substituted for *confined* and the word *released* for *discharged*

475. (1) Whenever any relative or friend of any person detained under the provisions of S 466 or S 471 desires that he shall be delivered to his care and custody the Local Government may, upon the application of such relative or friend and on his giving security to the satisfaction of such Local Government that the person delivered shall—

Procedure where lunatic prisoner is reported capable of making his defence

Delivery of lunatic to care of relative or friend

(a) be properly taken care of and prevented from doing injury to himself or to any other person, and

(b) be produced for the inspection of such officer, and at such times and places, as the Local Government may direct, and

(c) in the case of a person detained under S. 466, be produced when required before such Magistrate or Court, order such person to be delivered to such relative or friend

(2) If the person so delivered is accused of any offence the trial of which has been postponed by reason of his being of unsound mind and incapable of making his defence, and the inspecting officer referred to in sub-section (1), clause (b), certifies at any time to the Magistrate or Court that such person is capable of making his defence such Magistrate or Court shall call upon the relative or friend to whom such accused was delivered to produce him before the Magistrate or Court, and, upon such production, the Magistrate or Court shall proceed in accordance with the provisions of S. 468, and the certificate of the inspecting officer shall be receivable as evidence

CHANGE —The whole section has been re-drafted. Clause (c) and sub-section (2) are entirely new. Clause (b) was formerly sub-section (2).

The new sub-section (2) simplifies the procedure under which a person accused of an offence whose trial has been postponed by reason of his unsoundness of mind is again produced before the Court on the certificate of the inspecting officer as to his recovery."

—Statement of Objects and Reasons (1914)

CHAPTER XXX

PROCEEDINGS IN CASE OF CERTAIN OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE

<p>476. (1) When any Civil, Criminal or Revenue Court is of opinion that there is ground for inquiring into any offence referred to in S. 195 and committed before it or brought under its notice in</p>	<p>476. (1) If then any Civil, Revenue or Criminal Court is, whether on application made to it in this behalf or otherwise, of opinion that it is expedient in the interests of justice that an inquiry should be</p>
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the course of a judicial proceeding, such Court, after making any preliminary inquiry that may be necessary, may send the case for inquiry or trial to the nearest Magistrate of the first class, and may send the accused in custody, or take sufficient security for his appearance, before such Magistrate, and may bind over any person to appear and give evidence on such inquiry or trial

made into any offence referred to in S 195, sub S (1), clause (b) or clause (c), which appears to have been committed in or in relation to a proceeding in that Court, such Court may after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court, and shall forward the same to a Magistrate of the first class having jurisdiction, and may take sufficient security for the appearance of the accused before such Magistrate or if the alleged offence is non-bailable may if it thinks necessary so to do send the accused in custody to such Magistrate, and may bind over any person to appear and give evidence before such Magistrate

For the purposes of this subsection, a Chief Presiding Magistrate shall be deemed to be a Magistrate of the first class

(2) Such Magistrate shall thereupon proceed according to law, and as if upon complaint made and recorded under S 200 and may, if he is authorised under S 192

(2) Such Magistrate shall thereupon proceed according to law and as if upon complaint made under S 200

to transfer cases, transfer the inquiry or trial to some other competent Magistrate

(3) *If here it is brought to the notice of such Magistrate, or of any other Magistrate to whom the case may have been transferred, that an appeal is pending against the decision arrived at in the judicial proceeding out of which the matter has arisen, he may, if he think fit, at any stage adjourn the hearing of the case until such appeal is decided*

CHANGE.—The whole section has been redrafted by the Cr P C Amendment Act 1923 but no important change has been introduced. Subsection (3) is new. “The changes that we have made are not of great importance. We have provided that a Court can act on application made to it or *uo moto* and after such preliminary inquiry if any as it thinks necessary. For the words “committed before it or brought under its notice in the course of a judicial proceeding” we have substituted the phraseology used in clause (b) of section 195. We have substituted “may make a complaint” for “shall make a complaint” and in view of the criticism of the words ‘nearest first-class Magistrate’ we have provided that a complaint should be sent to a first class Magistrate having jurisdiction. In order to give effect to our decision that proceedings under section 476 etc. should be subject to revision we have introduced words which will make it necessary for the Court to record an order.”
—*Report of the Joint Committee*

OBJECT AND SCOPE OF SECTION.—It is easy to imagine the inconvenience which might be caused if a Munsiff or a Subordinate Judge or a Judge were to appear before a Magistrate and make a complaint on oath in order to lay the foundation for a prosecution and this section has been enacted to obviate the difficulty. The Legislature thought it desirable that the procedure to be followed in cases of complaint by a Court should be different from that which has to be observed by an ordinary complainant—7 ALL 871. Under Section 195 it is open to the Court before which the offence was committed to prefer a complaint for the prosecution of the offender, and sec 476 prescribes the procedure as to how that complaint may be preferred—32 BOM 184 31 MAD 140 32 MAD 49 7 ALL 871. The language of this section indicates that where a Court is acting under sec 195 a complaint in the strict sense of the Code is not required and the procedure herein laid down constitutes the com

plaint mentioned in sec 195—7 ALL 871 The order of a Court under section 476 is in the nature of a complaint under sec 195—9 C P L R 26 Proceedings taken by a Court under this section operate of themselves to set a prosecution in motion without the necessity of any other complaint the Court itself being the complainant—2 Weir 589

The words in subsection (2) of this section “and as if upon complaint made and recorded under sec 200” have been introduced into the Code in 1898 in order to give legislative effect to the Full Bench ruling in 7 ALL 871 which held that the order of the Court under this section was a complaint within the meaning of sec 195—26 ALL 249 That one of the functions of sec 476 is to provide the machinery by which a Court is enabled without inconvenience to make a complaint is made very clear by these words introduced in the present section—31 MAD 140 (per Miller J) Under subsection (1) as now amended the Court will have to frame a complaint in writing

Section 476 is supplementary to sec 195—The words ‘offences referred to in sec 195 mean not merely the offences covered by the sections of the I P C mentioned in section 195 but they mean the offences covered by those sections and committed under the qualifying circumstances mentioned in section 195 That is section 476 must be read along with section 195 and the qualifications mentioned in sec 195 are to be treated as incorporated in the provisions of section 476—19 Cr I J 638 (CAL) 49 MAD 510 Thus an offence under sec 467 I P C does not come within the purview of section 195 unless it is committed by a party to the proceeding and therefore a Court is not competent to pass an order under sec 476 directing the prosecution of a person who is *not a party to the proceeding* for an offence under sec 467 I P C—40 MAD 100, 1917 P R 10 [Nor is a complaint under this section necessary in order to proceed against such person—21 C W N 950] So also where certain documents were put into Court in a pending suit but *not given in evidence* the Court was not competent to order the prosecution of the party who had put in the documents for forgery—15 MAD 224 15 A W N 115 1920 P L R 3

But a wider view has been taken in the following cases This in 32 MAD 19, *Srinayan Nair J* held that section 476 must be construed as entirely self contained and the power given to the Civil Court under this Chapter to take action regarding the offence

mentioned in sec 195 is not restricted by the qualifying circumstances mentioned in sec 195. And therefore it is competent to a Court to order prosecution for forgery of a person who was not a party to the proceeding in Court—18 ROM 581, 20 Cr L J 630 (PAT), 21 O C 167. It is competent to a Court to proceed under sec 476 against a party who has filed a forged document, whether such document has been actually given in evidence or not—1897 P R 12, 22 CAL 1004. The words "referred to in sec 195" are merely words descriptive of the class of offences with which a particular Court can deal. They do not mean that sec 195 governs sec 476 to any extent other than this—40 ALL 116, 20 Cr L J 426 (NAG). Sec 476 is a self-contained section and the reference made to sec 195 is only for the purpose of avoiding the enumeration of the sections of the Penal Code mentioned in section 195—1 P L J 298.

But the intention of the Legislature is to make this section not independent of but supplementary to section 195. In submitting the Report of the Joint Committee before the Council of State in September 1922 the Hon ble Mr Moncrieff Smith said "One of the most weighty changes introduced by this measure (i.e. the Amendment Bill) is in respect of prosecutions for offences committed before or in relation to proceedings of the Courts. A glance at any commentary on the Code will give some indication of the difficulties that have arisen in putting sections 195 and 476 into operation. After a long and careful thought Government have decided on a line of action which I may say has met with general approval. The two sections as they stand (under the old Code) provide an alternative procedure for the Courts in dealing with them. Sanction is given to proceedings under sec 195 or action is directed by the Courts under sec 476. The sanction proceedings are now omitted and the *two sections will in future supplement each other*. Section 195 will contain the prohibition of prosecution except upon complaint by the Court, section 476 will lay down the procedure to be followed. It has been suggested that it will be better to bring the two sections together. That is a matter to be considered when the consolidation of the Code will be undertaken.—*Debates in the Council of State September 13 1922*

Civil Criminal or Revenue Court—As to what are 'Courts' and what are not, see notes under sec 195.

An Income Tax Collector is a Revenue Court within the meaning of this section—36 MAD 72, 1905 P R 44, 38 BOM 642. *Contra*—

S BOM L R 477 Where a sub-Registrar impounded a document presented for registration as insufficiently stamped, and sent it to the Collector, and the Deputy Collector acting on the orders of the Collector reported that the document was not genuine, whereupon the Collector directed the prosecution of the person who presented the document for registration, it was held that neither the Collector nor the Deputy Collector acted as a Court because the inquiry held by them solely for the purpose of determining who should be called upon to pay the stamp duty was not a judicial inquiry, and therefore the order directing the prosecution of the petitioner was without jurisdiction—7 C W N 795

Orders under this section can be passed only by a Civil Criminal or Revenue Court But an order which purported to be one passed as by a "Divisional Officer," that is to say, as by the Deputy Collector, to whom a Tahsildar before whom the alleged false statement was made, was subordinate, was held to be *ultra vires*—2 Weir 598

A certificate officer acting under the powers conferred upon him by secs 57, 58 and 66 of the Behar and Orissa Public Demands Recovery Act 1914, is, while acting in that capacity, a 'Court,' and where such officer enquires into the question of an alleged payment where a certificate has been issued the proceeding before him is a judicial proceeding—1 P L J 475

An officer acting in an *executive*, and not in a *judicial* capacity cannot exercise powers conferred under this section—15 A L J 654 See below under heading "Proceeding in Court"

Power after transfer —A Magistrate who after trying a case has been transferred from the charge of the particular Court in which the case was tried to some other duty in the same district is not competent to make an order under this section in respect of a case which he tried as the presiding officer of that Court—1 A L J 315

A joint Magistrate after dismissing the complaint in a case became the District Magistrate and then ordered the prosecution of the complainant for perjury under sec 193 I P C It was held that the order of the Joint Magistrate as a District Magistrate was bad and should be set aside—1 A L J 388

But the fact that the case has been transferred from one Court to another Court, after it has been partly heard by the first Court does not deprive the first Court of its jurisdiction to take proceedings against a witness in respect of a perjury committed before it, nor is that jurisdiction taken away by the circumstance that the second

Court may have formed a different view as to the veracity of the witness—44 ALL 642

Power of successor in office to act under this section—The power to direct prosecution is conferred on the "Court" and not on the particular officer who fills the judicial office at a particular time, and therefore the successor in office is competent to make an order under this section in respect of an offence committed before his predecessor in office—15 C W N 631 37 CAL 642 34 ALL 293 19 A L J 819, 32 BOM 184, 29 MAD 331, 14 N L R 16, 1919 M W N 112 1 BUR L T 246 In 34 CAL 551, 35 CAL 114 1909 P R 6 2 Weir 297 and 17 Cr L J 40 it has been held that a succeeding Magistrate has no jurisdiction to institute proceedings under this section, where an offence was neither 'committed before him nor was brought to his notice in the course of a judicial proceeding (see the words of the old section)' These words have now been replaced by the more general words 'committed in a proceeding in that Court' and in this view of the law the above five cases are no longer correct

Where proceedings under this section have been commenced by a particular officer it is competent for his successor-in-office to continue the proceedings—7 A L J 991 *Contra*—1911 P W R 4 where it is held that where the preliminary inquiry has been commenced by the proper officer who issued the notice, his successor is not competent to complete the inquiry and pass an order under this section But this ruling is no longer correct for the reasons stated above

Power of Superior (Appellate) Court to take action—See Sec 476A

Power of High Court and Courts in Presidency Towns—This section under the old law did not apply to an offence committed before Courts in Presidency towns consequently it was not competent to the High Court acting under this section to direct the prosecution of a person for the offence of forgery or abetment of forgery brought to its notice in the course of hearing an appeal in a Probate case—19 Cr L J 638 (CAL) see also 9 BOM L R 1160 This ruling is no longer correct in view of the second para (newly added) of sub-section (1)

DUTY OF COURT—The power given by this section should be exercised with care and due consideration It is not in every instance in which a party fails to prove his case that the Judge who

the case in which the petitioner is alleged to have given false evidence or produced a fabricated document—3 C L J 302, 16 BOM 729 6 CAL 308 1916 P R 29 If a proceeding had already been taken it should be adjourned till the hearing of the appeal See subsection (3)

“IS OF OPINION” —The opinion must be the opinion of the Court directing the prosecution the Court must form its own opinion and should not take opinion from others Where a Munsiff in making an order under this section purported to act not of his own accord but at the direction of the District Judge it was held that the order of the Munsiff was bad in as much as it was only nominally his while the opinion was the opinion of the District Judge—6 A L J 921 *Contra*—In 20 Cr L J 274 (PAT) it was held that the proceedings were not vitiated by the mere fact that the District Judge had directed the Munsiff to institute the proceedings

Offences covered by this Section —Under the old law the offences which fell under this section were those which were committed before the Court or were brought to its notice in the course of a judicial proceeding The wording of the present section is now changed

Where an affidavit containing a false statement was filed by a person before a Munsarim of Court it was held under the old section that the Judge could not direct the prosecution of that person because the offence of perjury was not committed before the Judge himself—15 A L J 517 But this is no longer correct because under the present section the offence has been committed ‘in relation to a proceeding in the Court’ The old section was wide enough to enable a Court to take action in respect of an offence committed in another forum (even in another province) and on some previous occasion provided it was brought to the notice of the Court in the course of a judicial proceeding—6 A L J 392, 40 ALL 116 1 P J J 293 The present section is confined to offences committed in relation to a proceeding in *that Court*

Where a person gave false evidence before the committing Magistrate which evidence on account of his inability to attend the Sessions Court owing to illness was read out as evidence at the Sessions trial the Sessions Judge would be competent to direct prosecution of the person for giving false evidence—1916 P R 29

As the offences contemplated by this section are offences mentioned in section 195 *ante*, a Magistrate cannot direct a prosecution

for an offence under section 421 I P C because this latter section is not mentioned in sec 195—18 A L J 70

Proceeding in Court—A departmental inquiry is not a proceeding in Court—18 Cr. L J 331 (HULL), 23 O C 136 Where a person preferred a complaint to a District Registrar containing allegation against the Sub-Registrar and the District Registrar after holding a departmental inquiry was satisfied as to the falsity of the complaint and directed the prosecution of the complainant for an offence under sec 182 I P C the order was held to be wholly without jurisdiction as the inquiry held by the District Registrar was a departmental inquiry and not a proceeding in a Court—10 C W N 222 Where a District Magistrate called for the record of a case before a Sub-Magistrate in his *executive capacity* for the purpose of enabling him to ascertain whether an application for an inquiry into the conduct of a police officer should be granted or not, and directed the prosecution of the police officer under sec 193 I P C it was held that the order should be set aside in as much as there was no proceeding before a Court for the purposes of this section—25 MAD 630 When a District Magistrate directed the prosecution of a person under sec 211 of the I P C for having given a false report of theft to the Police it was held that the order was not one passed under this section but one passed by the District Magistrate as *ex officio* head of the Police to whom a false complaint was made—10 A W N 167 A village headman made an application to the District Magistrate stating that he wished to resign his post On being questioned as to his reasons he stated that the Police in the course of the investigation into a dacoity case were forcing a large number of people to pay money to them Thereupon the Magistrate examined the headman on oath and sent the papers to the D S P who after inquiry reported that the charge against the Police was false Thereupon the District Magistrate passed an order directing the prosecution of the headman for perjury It was held that the order was illegal, as the proceedings before the District Magistrate were not proceedings in Court—38 ALL 32 After the dismissal of a complaint as false by a Deputy Magistrate, the papers were sent to the District Magistrate, on the motion of the Police for the case being struck off the register The District Magistrate in striking off the case ordered the prosecution of the complainant for an offence under sec 211 I P C It was held that the proceeding before the District Magistrate was not judicial but purely an executive one,

relating solely to the question as to the removal of the case from the register, and the order therefore did not come under this section—4 A W N 290 A proceeding before a Deputy Commissioner or Chairman of the District Board is not a proceeding in any Court within the meaning of this section—23 O C 136 Where the accused went to the Magistrate's house and made a false statement there, the offence cannot be said to have been committed in any proceeding before a Court—3 LAH L J 535

Proceedings which are irregular or illegal or without jurisdiction are not proceedings under this section, and therefore no order for prosecution can be passed in such proceedings Thus where the order of a Magistrate before whom a complaint was preferred, in making over the complaint to a subordinate Magistrate for inquiry and disposal of the case was bad in law, the order of the Subordinate Magistrate under sec 476 for prosecution of the complainant passed after such inquiry would be illegal—18 C W N 95 See also 16 C W N 885, 43 CAL 173 But see *contra*—1 P L J 553 A charge of unprofessional conduct made against a second grade pleader can be inquired into only by the presiding officer of the Court in which the pleader practises The District Judge has no jurisdiction to inquire into the matter, where the District Judge assumes jurisdiction in such a case, makes an inquiry and acquits the accused, and takes proceedings under this section for giving false evidence, the order cannot be upheld, as it is one without jurisdiction—1917 M W N 303

Where the complainant did not desire to take further proceedings and applied to withdraw the complaint, the Magistrate was not competent to order under this section the prosecution of the complainant under sec 211 I P C for making a false complaint on taking evidence, as there was no proceeding before him—4 C W N 351

Execution proceedings are proceedings in Court—37 CAL 642; 10 C W N 55, 25 M L J 593, 17 O C 309, 10 N L R 177, 19 Cr L J 153 (PAT) An appeal in a mutation case before the Commissioner is a proceeding contemplated by this section—6 P L J 178 Proceedings before a Collector under sec 69 of the Bengal Tenancy Act fall under this section—48 Cal 1086

PRELIMINARY INQUIRY —*Here not necessary* —For the purposes of this section, neither notice to show cause why the party should not be sent before a Magistrate for trial nor a preliminary inquiry is indispensable—7 BOM L R 81 There is no rigid rule of

law which makes it imperative on a Court to hold a preliminary inquiry before taking action under this section—20 CAL 474, 34 CAL 551, 15 ALL 392, 34 ALL 367 It is for the Court acting in the matter to determine in the exercise of its discretion whether or not to make a preliminary inquiry—20 CAL 249 20 CAL 474 Where a Munsiff sent a case under this section to the nearest first class Magistrate without making any inquiry, and where there was nothing to show that any inquiry the Munsiff could have made would have put the Magistrate in a better position the omission to hold a preliminary inquiry was not bad—5 ALL 62 If in the course of a proceeding, either Civil or Criminal the Judge or Magistrate finds clear grounds for believing that either the parties or their witnesses have committed perjury he is justified in directing criminal proceedings against such persons without any further inquiry than that which he had already held in his Court—6 CAL 308 In a prosecution for making a false charge under Sec 211 I P C, it is not always necessary that there should be a preliminary inquiry under this section—6 C W N 290 A preliminary inquiry is not necessary in all cases if there are materials on record on which a definite charge can be grounded—Ratanlal 895 Where an order was made under this section directing the prosecution of a witness under Sec 193 I P C, on the very day or the day after the witness's cross examination had been finished and upon a clear statement by the witness and after an opportunity having been given him to explain the inconsistency in his statements and in the cross examination it was held that it was not incumbent on the Magistrate to institute a fresh inquiry or to give any notice to the accused—1 P L W 44

Where necessary —Where a Magistrate dismissed a complaint without calling evidence he should make inquiry before charging the complainant with the offence of making a false charge—16 W R 41 Where a subordinate Judge acting upon the report of a bailiff ordered the prosecution of persons who obstructed him in executing a warrant of attachment without making an inquiry of his own it was held that the Subordinate Judge would have done well if he had complied with the requirements of this section—Ratanlal 701 Where in a Civil Suit settled without any evidence being gone into by confession of judgment the Court had grounds for supposing that an offence of false personation under Sec 205 I P C had been committed before it the Court before directing a prosecution would be competent to hold a preliminary inquiry to satisfy itself whether a *prima facie* case

has been made out for directing the prosecution—19 CAL 345 The Court directed the prosecution of a person under sec 174 I P C for the disobedience of summons to attend the Court and give evidence, and that person appeared and denied the service of summons on him *held* that before prosecution a preliminary inquiry should be held as to the service of summons and the said person should be given an opportunity to cross examine the persons who had deposed to the service of summons on him—19 A L J 56

Procedure in preliminary inquiry—Oath can be administered upon the suspected person, in the preliminary enquiry—8 BOM L R 589

The inquiry must be on evidence, one mode of making inquiry is certainly to take evidence—37 CAL 52, 17 CAL 872 But it is not necessary to go minutely into the evidence or to see whether there is sufficient evidence to support a conviction It is sufficient if the evidence discloses a reasonable foundation for a criminal charge—2 Weir 587 The law does not require a minute inquiry but only such preliminary inquiry as may be necessary—5 ALL 62

The Code does not contain any provision as to the manner in which the evidence in the inquiry should be recorded, but for future reference the Court should make a summary of the statements of the witnesses examined—42 CAL 240

It is not necessary that the preliminary inquiry should be conducted in the presence of the accused All that the Court making the inquiry has to do is to satisfy itself that there are *prima facie* grounds for sending the case for investigation to a Magistrate—9 W R 3 The accused has no right to cross examine any witness in the preliminary inquiry—18 BOM L R 284, 34 ALL 267, but see 6 P L J 146 and 19 A L J 56 *contra*

The preliminary inquiry must be conducted by the officer who directs prosecution under this section and cannot be delegated to any other officer—20 Cr L J 245 (PAT)

The proceedings in inquiries under this section are judicial proceedings and the person against whom they are directed is in the position of an accused person To examine such a person as a witness in the course of such proceedings is *ultra vires* In such proceedings the person can only be examined in accordance with the provisions of section 312 He cannot properly be asked questions merely to elicit a statement as a foundation for ordering his prosecution—10 BUR L T 32

It is not necessary that the whole of the preliminary inquiry ought to be conducted by the Court directing the prosecution. He can apply to the District Magistrate as Head of the Police, for the assistance of the C. I. D. and the fact that he takes the assistance of the District Magistrate does not make him *functus officio* and deprive him of his jurisdiction to pass an order under this section—13 BOM 300

NOTICE TO ACCUSED—This section nowhere says that notice shall be given to the person intended to be proceeded against, and the want of notice is at best a mere irregularity in procedure—10 A. L. J. 217, 2 BUR. L. J. 153 L. H. R. (1915) 3rd Qr 83. For a proceeding under this section neither notice to show cause why the party should not be sent before a Magistrate nor a preliminary inquiry is indispensable—7 BOM. L. R. 81 15 C. W. N. 601. But if a preliminary inquiry is started it must be a real inquiry and not merely a formal one and the accused must be given ample opportunity to show cause why he should not be prosecuted—1 P. L. T. 312 21 Cr. L. J. 29 (PAT) 1 P. L. J. 135 10 A. L. J. 217, 1 H. R. (1915) 3rd Qr 83 4 P. L. J. 475. If the Court is of opinion that there is ground for taking action under this section the accused should be given an opportunity to show cause against such order—2 Weir 387 and should be afforded every opportunity of adducing evidence in support of his case—21 Cr. L. J. 158 (PAT), 44 M. L. J. 74. When a Magistrate dismisses a complaint and takes action under this section against the complainant for preferring a false charge, he should give the complainant an opportunity of showing the truth or *bona fide* character of his complaint—7 MAD 189 21 M. L. J. 795, 5 C. W. N. 106 6 CAL 496 7 CAL 87. So also where a Civil Court directed the prosecution of the defendant in a Civil suit for fabricating false evidence without calling upon the defendant to shew cause it was held that the Court acted wrongly in ordering prosecution without giving the person concerned an opportunity to shew cause against such order—17 O. C. 25. But the proceedings will not be irregular merely because the accused was not given an opportunity of substantiating the case—7 CAL 208 7 MAD 292 4 ALL 189.

ORDER UNDER THIS SECTION—An order under this Section must specify the person alleged to have committed the offence. Where a District Judge, being of opinion that the forgery of a document produced before him was committed either by the plaintiff or by the defendant, sent both of them to the nearest first class Magistrate

so that the guilty party might be proceeded against, it was held that the order was illegal and must be set aside in revision—1905 P L R 163

The order must *specify the offence committed*—8 S L R 179 A District Magistrate passed an order directing prosecution for perjury or in the alternative for an offence under Sec 182 I P C It was held that the option of that kind was not an order at all and therefore not valid—25 ALL 234 If the offence is perjury, the Court directing prosecution should specify the false statement in regard to which prosecution is directed, if the offence is in respect of a forged document the Court should mention the forged portion of the document Omission to specify these particulars amounts to a material irregularity calling for interference of the High Court in revision—35 ALL 695 4 P L W 44

An order under this section should disclose the materials upon which it is based such an order is a judicial order if it does not show the basis upon which it was passed it is liable to be set aside in revision by the High Court—1 P L T 717

A Magistrate is competent under Sec 250 to order the complainant to pay *compensation* to the accused and also to *direct the prosecution* of the complainant for bringing a false charge—21 MAD 237, 27 MAD 59, 30 CAL 123 10 S L R 162 (*Contra*—26 CAL 181, 22 CAL 586) But the *two orders must be simultaneous* where the Magistrate ordered the complainant to pay compensation to the accused under Sec 250 and three weeks later he passed an order directing the issue of notice to the complainant to shew cause why he should not be prosecuted for an offence under Sec 211 I P C it was held that this latter order was not proper under the circumstances—20 Cr L J 226 (PAT)

An order under this section which merely directs the prosecution of the accused but omits to direct the accused *to be taken before the First Class Magistrate* was held to be at most an irregularity cured by section 537 (b) of this Code—37 MAD 317 But it would not be so now because Clause (b) of section 537 has been omitted by the Amendment Act of 1923

Court cannot itself try the case —Where a Court is informed that an offence referred to in section 191 has been committed by certain persons in connection with certain proceedings of the Court, it cannot itself try the charge and convict those persons The Court should have proceeded under section 176 The trial by the Court

itself is irregular, and such irregularity is not cured by section 537—18 Cr. L. J. 969 (OUDH).

Effect of reversal of the order directing prosecution—If an order under section 476 (1) directing inquiry by a Magistrate of the First Class is set aside, it is just and proper that proceedings under sub-section (2)¹, before that Magistrate must also cease, the Magistrate cannot proceed with the enquiry any further—6 L. B. R. 49. Thus, where in a suit on a registered bond alleged to have been executed by the defendant, the Munsiff held that the bond was genuine, and directed the prosecution of the defendant, who had denied the execution of the bond, for an offence under section 193 I. P. C. and sent the defendant to the nearest First Class Magistrate to be tried for the offence, but on appeal the judgment of the Munsiff was reversed by the Sub Judge who held that the bond was not genuine and that the defendant had not executed it, it was held that the result of the judgment of the Appellate Court must be taken to be that the order for the prosecution of the defendant was not maintainable and that the inquiry into the case of the defendant by the First Class Magistrate must be stopped and should proceed no further, and that if the defendant had been convicted by the Magistrate the conviction will be set aside by the High Court although the defendant did not move the High Court to quash the proceedings taken against him—12 C. W. N. 1 But where a Magistrate dismissed a complaint and directed prosecution of the complainant under this section, and the Sessions Judge directed further inquiry setting aside the order of dismissal but *passed no order in respect of the order of prosecution*, it was held that the order of prosecution remained good until it was quashed and the Magistrate to whom the case was sent was competent to continue the inquiry—21 M. L. J. 795

—**FIRST CLASS MAGISTRATE**—Under the old section the Court before which an offence was committed had to send the case for inquiry or trial to the nearest First Class Magistrate, and it was not necessary that such Magistrate should be a Magistrate having jurisdiction over the offence. The order making the transfer was of itself sufficient to confer jurisdiction on such Magistrate—16 MAD. 461; 20 Cr. L. J. 202 (PAT). The power to send the case to the nearest Magistrate of the First Class was quite irrespective of the local jurisdiction of the Magistrate to whom the offender was forwarded;

section 177 in no way curtailed the power under this section—Ratanlal 88 But in 1 S L R 84, however, it was held that the word 'nearest' was merely directory, it did not confer jurisdiction, and the Magistrate to whom an accused had to be sent under this section must be a Magistrate having local jurisdiction over the offence.

To remove this conflict of opinion, it has now been expressly laid down that the Magistrate to whom the accused is to be sent must be a Magistrate having *jurisdiction*, thus adopting the view of the Sind case.

This section authorises the Court to send the accused to the First Class Magistrate, it does not permit the Court to *commit him to the Sessions*—3 BOM L R 185.

The Court should *specify the Magistrate* to whom the case is sent; an order that the case be sent to the Magisterial authorities for investigation is not sufficient—4 N W P H C R 86.

POWER OF THE MAGISTRATE—The Magistrate to whom the case is sent under this section must proceed according to law, and dispose of the case—7 B H C R 29, 26 BOM 785, 31 CAL 664. He cannot refuse to take cognizance of the offence—13 BOM 109, and cannot return the case to the Court which sent it—12 W R 41.

The Magistrate receiving a case under section 476 cannot act under section 202. The latter section enables a Magistrate *who is not satisfied as to the truth of the complaint* to postpone the issue of process and to direct a local investigation. Now section 476 presupposes that the Court (Civil, Criminal or Revenue) making the reference to the Magistrate must be of opinion that *there is ground for inquiry* into the offence in respect of which the case is sent to the Magistrate. This shows that section 476 precludes the application of section 202, and that there can be no room for the investigation which is contemplated by that section—21 Cr L J 310 (NAG).

The expression 'proceed according to law' in subsection (2) requires the Magistrate receiving the reference to proceed under chapters XVIII to XXI of the Code according to the nature of the offence supposed to have been committed. Chapter XVII has of course no application, in as much as the accused must necessarily appear before the receiving Magistrate as a consequence of the reference itself—21 Cr. L. J 310.

The Magistrate to whom a case has been sent is competent to discharge the accused under section 253 if in his opinion the evidence

against the accused is not sufficient to warrant a committal to the Court of Session—5 B H C H 1

If the order under this section is made without jurisdiction, the Magistrate is competent to dismiss the complaint—(1911) 2 M W N 431 The Magistrate while dismissing the case and acquitting the accused cannot direct compensation to be paid to the accused. Thus where the decree holder complained to the Civil Court of obstruction by the judgment-debtor, whereupon proceedings were directed against the judgment-debtor under this section, and after the trial and acquittal of the accused the Magistrate directed the decree holder to pay compensation it was held that the order was not valid, since the decree holder was not the complainant. The real complainant was the Civil Court which directed the prosecution of the accused—11 BOM L R 1165

The Magistrate is competent to proceed against persons not named in the order of the Court directing the prosecution under this section. The Code provides for taking cognizance of offences and not of offenders and a Magistrate who has legally taken cognizance of an offence on an order under section 476 has jurisdiction to proceed against any one who may be proved by the evidence to be concerned in the offence whether he was mentioned in the order or not—21 C W N 950 1917 P R 31 43 BOM 300

LIMIT OF TIME FOR TAKING ACTION—This section does not limit the time within which action should be taken, and there is no legal necessity to proceed under this section immediately after the original trial or proceedings—19 A L J 819 7 E I H 187 1916 P R 29 19 Cr L J 981 5 O I J 622 20 Cr L J 274 (PAT) But still it is desirable that an order under this section should be made either at the close of the proceeding or so shortly thereafter that it may be reasonably said that the order is part of the proceeding—31 MAD 140 20 Cr L J 181, 20 Cr L J 286 1916 P W R 53, 18 Cr L J 331 (BUR), 32 MAD 49 42 MAD 422 If the Magistrate thinks that action ought to be taken under this section he ought to pass such order as early as possible (and not delayed by several months) after the termination of the original case—40 CAL 441 38 ALL 695 A delay of two months was considered too long—18 Cr L J 331 In 20 Cr L J 226 (PATNA) a delay of three weeks was held to be too much under the circumstances of the case. In 43 BOM 300 it has been held however, that there is nothing in the wording of this section to

hold that officers acting under it are bound to make their inquiry either in the actual course of the judicial proceedings, or so shortly thereafter as to make it really a continuation of those proceedings.

At the same time it should be noted that an order directing prosecution should not be made *too early* i.e. at a time when the proceeding in which the offence is committed is yet in a preliminary stage and evidence has not been fully brought before the Court—20 Cr L J 286 (CAL) See notes *ante* under heading "Court should not take action pending trial of the case"

Where an appeal is preferred against the original case, the Court is justified in waiting till the disposal of the appeal before directing prosecution under this section—1916 P R 29, 3 C L J 302 16 BOM 729, 6 CAL 308

Where proceedings for directing a prosecution are commenced in the course of a judicial proceeding or so soon thereafter as to make the former substantially a continuation of the latter, the final order directing the prosecution will not be vitiated by the fact that it was passed more than a year afterwards—1919 M W N 112 But the Court will set aside an order directing a prosecution if it is passed so long after the offence that the delay is oppressive or scandalous—*Ibid*

REVISION —Power of Sessions Judge —A Sessions Judge has no power to interfere with an order under section 476, nor with a complaint under section 195 made by a Deputy Magistrate—23 MAD 205, 34 CAL 42 If the Sessions Judge is of opinion that the order should be set aside, he should refer the matter to the High Court—15 Cr L J 16 (CAL)

Power of High Court —There is a conflict of opinion as to whether the High Court is competent in the exercise of its revisional powers to interfere with an order of prosecution passed under this section In 26 BOM 785, 4 BOM L R 618, 34 CAL 42, 21 MAD 124, 20 CAL 349, 33 MAD 48, it has been held that the High Court has such power in revision, while the contrary view has been held in 25 MAD 98, 13 BOM 109 13 MAD 144 16 ALL 80, Ratulid 695

Those who hold the latter view base their decision on the ground that the effect of the introduction of the words "as if upon complaint made and recorded under section 200" in the Code of 1898 is that the order under this section is merely a *complaint* and not an *order*, and is therefore not subject to revision by the High Court, see

26 MAD 98 Whereas the other rulings which are in favour of the High Court's power of interference are of opinion that the addition of those words in the section do not mean that the proceedings of the Court directing prosecution are to be taken merely as a complaint and not as an order, see 33 MAD 48, 21 MAD 121

But it is the intention of the Legislature that the order under this section is to be subject to revision, see the Report of the Joint Committee cited under heading "Change" above

When High Court will interfere and when not —Orders purporting to be made under this section are open to revision by the High Court when they have been made during proceedings held entirely without jurisdiction—29 MAD 100 When the Lower Court has proceeded upon merely fanciful grounds or grounds so obviously wrong that it could not be said to have formed a serious judicial opinion at all then the High Court will interfere and set aside the order of the Court below—23 ALL 249, 25 BOM L R 282, 10 N L R 177, but where the Lower Court has arrived at a judicial opinion on substantial grounds and the order shows that the Court has acted with circumspection and mature deliberation, the order should not be interfered with merely because the High Court disagrees with that opinion—23 ALL 249, 4 A L J 803, 18 Cr L J 1015 (NAG) Revision should be granted if there be some error of law, some irregularity some abuse or failure to exercise jurisdiction, and not simply because the Revisional Court has formed a different opinion from that of the Court below on the merits of the case—1902 P R 18 Where an order was made on insufficient grounds and no further action was taken by the Court for more than a year it was held that this was a case in which the revisional powers of the High Court might properly be exercised and the order set aside—21 A W N 177

Proceedings of a *civil court* under this section cannot be interfered with by a *criminal Bench* of the High Court in Revision The power of revision under section 435 is confined to the records of inferior *criminal courts* Therefore when an order under this section was passed by a Civil Court, the High Court can interfere only under section 115 of the Civil Procedure Code—40 CAL 477, 8 C W N 73, 10 N L R 23 (1915) P R R 3rd Qr 83, 35 ALL 695, 10 BUR L T 13 21 O C 367 See also notes under section 195

Similarly, the High Court has no power in revision to interfere with an order passed by a *Revenue Court* under this section, but an

that it ought to be tried by the High Court or Court of Session, such Civil or Revenue Court may, instead of sending the case under S 476 to a Magistrate for inquiry, itself complete the inquiry and commit or hold to bail the accused person to take his trial before the High Court or Court of Session, as the case may be

(2) For the purposes of an inquiry under this section the Civil or Revenue Court may * * exercise all the powers of a Magistrate, and its proceedings in such inquiry shall be conducted as nearly as may be in accordance with the provisions of Chapter XVIII *and of Chapter XXVIII in cases where that Chapter applies* and shall be deemed to have been held by a Magistrate

CHANGE —The words "Subject to the provisions of section 443" have been omitted after the word "may," and the italicised words have been added by the Criminal Law Amendment Act 1923. As a result of this Amendment, this section has been made applicable to European British subjects

SECTIONS 476 AND 478 —This section should be read as alternative to section 476 and not supplementary to it. The procedure prescribed by this section viz., of completing the investigation and committing the accused is only alternative to S 476 (see the words 'instead of sending the case under section 476') and therefore if the accused who had been sent by the Civil Court to the First Class Magistrate under section 476, has been discharged by the Magistrate, the Civil Court has no power to revive the case against the accused, and adopt the procedure prescribed by this section.—*Rattinal 959*

This section deals with a more extended class of cases than section 476 and covers cases in which any Court whether civil or revenue whether possessing power of committal or not may take action and commit for trial—4 BOM 287. Section 476 merely lays down the procedure that may be followed in certain cases and does not confer any new jurisdiction on a Court. That section does not by itself give to the Civil Court the powers of a committal in the cases referred to in that section and that is why section 478 has been enacted.—*Ibid*

SCOPE —The power of a Civil Court to commit a case to the Sessions is limited to cases triable exclusively by the Court of Session, and to such cases only when the offence charged has been committed before the Civil Court itself—1 BOM 257

This section, like section 476, must be taken as supplementary to section 195 in this sense that the Court can direct committal under section 478 for an offence referred to under section 195 only when such offence has been committed under the circumstances mentioned in section 195. And therefore a Civil Court cannot direct committal for offences under sections 463 and 471 I. P. C. unless the documents have been *given in evidence*, as mentioned in clause (e) of section 195. If the documents have been merely put in court but not given in evidence, section 195 cannot apply, and section 478 also will not apply—15 MAD 224. But in 22 CAL 1004 and 40 ALL 116 it has been held that the words “any such offence” in this section simply mean an offence referred to in section 195 and not an offence qualified by the circumstances mentioned in section 195. See this subject fully discussed under section 476 under heading “Section 476 supplementary to section 195”

PRELIMINARY INQUIRY —A Civil Court has no power to order the commitment of persons for offences referred to in section 195, without holding the preliminary enquiry required by this section—22 W. R. 52

PROCEDURE —The procedure referred to in sub-section (2) e.g., the procedure of chapter XVIII must be followed as nearly as possible. Where notices were issued to the persons concerned and after recording very brief statements of the accused, charge-sheets were drawn up and commitment order passed without examining any of the witnesses and without the charge being explained to the accused, it was held that the Court not having followed the procedure as laid down in Ch. XVIII the order was illegal—40 ALL 32

REVISION —Though certain Magisterial powers have been given to the Civil Court under this section for the purpose of investigating cases of contempt of Court it still remains while exercising those powers a Civil Court and is not an ‘inferior Criminal Court’ within the meaning of section 435. It is not therefore amenable to the jurisdiction of the Sessions Judge. The Sessions Judge therefore has no power to revise the proceedings of the Civil Court—5 M. L. J 226

479. When any such commitment is made by a Civil or Revenue Court, the Court shall send the charge with the order of commitment and the record of the case to the Presidency Magistrate, District Magistrate or other Magistrate.

Procedure of Civil or Revenue Court in such cases

Magistrate authorized to commit for trial, and such Magistrate shall bring the case before the High Court or Court of Session, as the case may be, together with the witnesses for the prosecution and defence

480. (1) When any such offence as is described in S 175, S 178, S 179, S 180 or S 228 of the Indian Penal Code is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender * * * to be detained in custody and at any time before the rising of the Court on the same day may, if it thinks fit, take cognizance of the offence and sentence the offender to fine not exceeding two hundred rupees, and in default of payment, to simple imprisonment for a term which may extend to one month unless such fine be sooner paid

(2) Nothing in S 29 A or in chapter XXXIII shall be deemed to apply to proceedings under this section

CHANGE —The words "whether he is a European British Subject or not" have been omitted in subsection (1), and the words "section 29A or in Chapter XXXIII" have been substituted for the words "section 443 or 444," by the Criminal Law Amendment Act, 1923

SCOPE —This section and the next deal with what is known in English law as direct contempt that is contempt committed in the view or presence of the Court. The High Court has got greater powers (not by virtue of this Code or the Penal Code, but by virtue of the common law of England) to punish for contempts committed out of Court, e.g., comments on proceedings pending in the High Court—10 CAL 109 P C (*Surendra Nath Banerjee's case*) See also 14 BOM L R 231 and 15 C W N 771

But the High Court cannot punish for contempts of subordinate courts. Though the High Court is a Court of Record and though it exercises powers of superintendence over Mofassil courts, and though the Mofassil courts are subject to the appellate and revisional jurisdiction of the High Court, that court has no power to punish for contempts of Mofassil courts—11 CAL 173 S B (*A B Patil's case*), dissenting from 21 M L J 832 (F B)

APPLICATION OF SECTION —This section empowers a Magistrate to deal with the accused only when he is shown to have committed one of the offences enumerated in this section—5 M L T 2-6

The offence of contempt must be committed before a judicial proceeding in order to come under this section. An inquiry by a Magistrate into a case of breach of peace in order to ascertain whether he should make a report to his official superior and to satisfy himself whether he should act under section 108 is not a judicial proceeding, and a person behaving insolently to the Magistrate in such proceeding cannot be proceeded against under this section—2 Weir 605

The offence must be committed in the view and presence of the Court to attract the provisions of this section. The plaintiff in a suit was directed to appear with certain account books on a specified date and give his deposition before a Small Cause Court failing which the suit was to be decided against him. The plaintiff did not appear as directed and the Munsiff called upon him to show cause why he should not be fined for disobedience. Cause was shown by a petition but there was no appearance and he was fined for contempt of Court. It was held that the case did not come under this section and there was no offence committed in the view or presence of the Court and the order was therefore without jurisdiction—23 C W N 389

CONTEMPT—An application for transfer from a particular Court on the ground of probable miscarriage of justice is not contempt of that Court—140 P H 11, 46 BOM 973 (976). Even if in such an application the accused uses certain unhappy remarks concerning the Magistrate from whose Court the case is sought to be transferred, it cannot be presumed that the accused intended to insult the Court—35 ALL 281 18 A W N 115. Walking with creaking shoes near the Court room does not *per se* lead to the conclusion that the accused intended to insult or interrupt the Court in its work—5 M L T 286. Perjury by a witness may though it does not necessarily amount to contempt of Court—in B H C R 69. See also 15 W R 5, 4 B H C R 6, 1 B H C R 7. An irrelevant question put to a witness cannot amount to contempt, though a persistence in vexatious or irrelevant question after warning might amount to contempt—1867 P R 11. But every little insistence on the part of a pleader in the conduct of his case should not be turned into an occasion for a criminal trial unless the pleader's conduct is so clearly vexatious as to lead to an inference that his intention is to interrupt or insult the Court—6 BOM L R 541, 15 W R 62, 10 C W N 1062. Any trivial incident such as laugh or hesitation in speaking is not a contempt—4 M H C R 146. A witness who having a document in his possession will not produce it

is guilty of contempt, and can be dealt with under this section—12 BOM 63 An accused who in the course of his statement under section 342 calls the Judge a 'prejudiced Judge' and being called upon by the Judge to withdraw the remark refuses to do so is guilty of contempt, and can be proceeded against under this section—46 BOM 973

A comment on a pending case if it has or may have the effect of prejudicing the fair trial of an accused person, amounts to a contempt of Court—14 BOM L R 231 An article in a newspaper reflecting on the party to a suit more especially when he is under cross examination, is a contempt of Court—15 C W N 771 But such contempts can be punished only by the High Court See 'Scope' above

BEFORE THE RISING OF THE COURT—The provisions of this section must be applied then and there, or at any rate before the rising of the Court, in whose view or presence a contempt has been committed, if it considers that it can be properly and adequately dealt with under this section Therefore, where a Magistrate, whose presence a contempt was committed after taking cognizance of the matter postponed passing final orders in order to afford the accused an opportunity of showing cause why such order should not be passed and eventually fined him several days after, it was held that the procedure adopted by the Magistrate was irregular, and that the procedure would have been to detain the accused and to deal with the matter at once or before rising—11 ALL 361 But rising for a short time in the middle of the day (for luncheon) does not amount to rising of the Court for the day—46 BOM 973 (979)

FINE OF Rs 200—Where the Court deals with the offence of contempt of Court under this section, it cannot pass the sentence prescribed by section 228 I P C but should under this section limit the punishment to Rs 200/- with imprisonment in default for 20 days—2 Weir 603 If it considers the fine of Rs 200/ too light a sentence for the offence, it ought to refer the case under section 482 to some competent Magistrate—10 W R 17, 6 M H C R APP 16

A *substantive* sentence of imprisonment cannot be passed under this section in a case under section 228 I P C—10 W R 17 The imprisonment will be only in default of fine

APPEAL—Any order by a Sessions Judge under section 228 I P C imposing a fine on a person for intentional insult to the Judge when sitting in a stage of judicial proceeding amounts to

trial, though by a summary mode, and is therefore appealable—4 M. H. C. R. 146

A Sessions Judge cannot refuse to hear an appeal against an order under this section, because in his opinion the matter is a mere trifle. He is bound to hear the appeal and come to a finding whether the conviction is legal or not—Ratanlal 978

481. (1) In every such case the court shall record the facts constituting the offence, with the statement (if any) made by the offender, as well as the finding and sentence

(2) If the offence is under S. 228 of the Indian Penal Code, the record shall show the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult

SUBSECTION (1) —A Criminal Court inflicting a fine for contempt of Court should specifically record its reasons, and the facts constituting the contempt, with any statements the offender may make, as well as the finding and sentence—4 M. H. C. R. 229. The directions contained in this section are mandatory, and the omission to record the particulars as directed by the section is fatal to the proceedings—10 C. W. N. 1062

SUBSECTION (2) —Where a person is charged with an offence under section 228 I. P. C. the record convicting him must show the stage of judicial proceeding interrupted and the evidence must establish that such interruption was intentional. Omission to do so is a vital irregularity in procedure not curable by section 537 of this Code—15 C. L. J. 521 (MAD.) 1886 P. R. 36

482. (1) If the Court in any case considers that a person accused of any of the offences referred to in S. 480 and committed in its view or presence should be imprisoned otherwise than in default of payment of fine, or that a fine exceeding two hundred rupees should be imposed upon him, or such Court is for any other reason of opinion that the case should not be disposed of under S. 480, such Court, after recording the facts constituting the offence and the statement of the accused as hereinbefore provided, may forward the case to a Magistrate having jurisdiction to try the same, and may require security to be given for the appearance of such accused person before such Magistrate, or

is guilty of contempt, and can be dealt with under this section—12 BOM 63 An accused who in the course of his statement under section 342 calls the Judge a 'prejudiced Judge' and being called upon by the Judge to withdraw the remark refuses to do so, is guilty of contempt, and can be proceeded against under this section—46 BOM 973

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FINE OF Rs 200 —Where the Court deals with the offence of contempt of Court under this section, it cannot pass the sentence prescribed by section 228 I P C but should under this section limit the punishment to Rs 200/ with imprisonment in default for 30 days—2 Weir 603 If it considers the fine of Rs 200/- too light a sentence for the offence, it ought to refer the case under section 482 to some competent Magistrate—10 W R 47, 6 M H C R APP 16

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if sufficient security is not given, shall forward such person in custody to such Magistrate.

(2) The Magistrate, to whom any case is forwarded under this section, shall proceed to hear the complaint against the accused person in manner hereinbefore provided.

SECTIONS 480, 482 —Under section 480 the Magistrate can award a fine up to Rs 200, or a sentence of imprisonment in default of payment of fine. If, however the Magistrate considers that a substantive sentence of imprisonment or a heavier fine is demanded by the circumstances of the case, he ought to commit the case to another Magistrate—6 M H C R APP 16, 10 W. R 47

Section 482 need not be read along with section 480, and section 482 does not require a Magistrate to draw up proceedings on the same day that the offence is committed—35 CAL 161.

PROCEDURE —If a Court considers a substantive sentence of imprisonment necessary, it should record a statement of the facts constituting the contempt and the statement of the accused and forward the case to another Magistrate—11 W R 49

Statement of accused —A Barrister in the course of the trial of a case in which he was the complainant, used insulting language to the Sub-Magistrate. The Magistrate then recorded proceedings required by this section but failed to take any statement from the accused explanatory of his conduct, as the accused left the Court at once. It was held that the omission to take such statement was not fatal to the proceedings, and the case ought not to be dismissed on that ground—2 Weir 601

483. When the Local Government so directs, any Registrar or Sub-Registrar appointed under the Indian Registration Act, 1908, shall be deemed to be a Civil Court within the meaning of Ss 480 and 482.

A Registrar or Sub-Registrar may be deemed to be a Court only for the purposes of sections 480 and 482, and it cannot be implied that he is to be considered a Court for ordinary purposes. A provision that a particular officer may for a particular purpose be deemed a Court does not warrant the extension of that provision so as by inference to produce a group of rules in conflict with the general system. A provision such as that contained in this section is an exception to the general system such an exceptional pro-

vision should not be drawn out into all its logical consequences—12
BOM 36

484. When any Court has under S 480 or S 482 adjudged an offender to punishment on submission or forwarded him to a Magistrate for apology or trial for refusing or omitting to do anything which he was lawfully required to do, or for any intentional insult or interruption, the Court may, in its discretion, discharge the offender or remit the punishment on his submission to the order or requisition of such Court, or on apology being made to its satisfaction.

Power of High Court to interfere —A pleader was tried and punished for contempt by a Munsiff for having used certain words which the latter thought to be derogatory to his position. The pleader gave an assurance that the words in question had no reference to the Court, but the Munsiff declined to accept the assurance. The District Judge refused to interfere on appeal by the pleader. The High Court on revision directed the Munsiff to consider whether it was not a case in which he himself should take action under section 484 of the Code. Upon the Munsiff declining to do so because the pleader had not withdrawn the words in question the High Court held that the assurance given by the pleader should be taken to be sufficient, and remitted the punishment—11 A L J 955

Discharge on submission or apology —Too much notice should not be taken of a hasty language used by rustic litigants during a moment of excitement, without any serious intention of insulting the Court. If the offender offers an apology or adopts a submissive attitude, an admonition by the Court or at the most a petty fine, would be sufficient —1912 P W R 23

485. If any witness or person called to produce a document or thing before a Criminal Court refuses to answer such questions as are put to him or to produce any document or thing in his possession or power which the Court requires him to produce, and does not offer any reasonable excuse for such refusal, such Court may, for reasons to be recorded in writing, sentence him to simple imprisonment, or by warrant under the hand of the presiding Magistrate or Judge commit him to the custody of an officer of the Court for any term not exceeding seven days,

if sufficient security is not given, shall forward such person in custody to such Magistrate

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RIGHT OF CHILDREN TO MAINTENANCE —The child must be *born*, no order can be passed under this section for the maintenance of a foetus, when it is believed that a woman is pregnant Until it is born, it can hardly be regarded as a child—3 N W P H C R 70, 2 Weir 618

The word 'child' in this section simply means son or daughter Reference to age is purposely omitted, the object being that any son or daughter is entitled to maintenance so long as he or she is unable to maintain herself or himself—1910 P W R 28 In 37 MAD 565 and 5 N L J 247, it has been held that the word 'child' means one who has not attained majority

Legitimate children —A child born during the continuance of the form of marriage known as *sambandham* and prevalent among the Nayar community in Malabar, is entitled to maintenance under this section—22 MAD 246 22 MAD 247 (Foot note) Children of a Nikah wife are legitimate and entitled to maintenance—18 W R 28

Illegitimate children —An order under this section may be passed for the maintenance of legitimate as well as illegitimate children The basis of an application for the maintenance of a child under this section is the paternity of the child irrespective of its legitimacy or illegitimacy—16 CAL 781 But before an order for the maintenance of illegitimate children is passed, it must be proved that the man against whom the woman proceeds was the father of the children—18 ALL 107 Where maintenance is claimed for an illegitimate child from an alleged father it is not enough that the defendant may have been the father but the Magistrate must be able to find that in all probability no one else can have been—2 Weir 621 The Magistrate is not justified in holding that the child was the child of the defendant on the ground of the similarity of the features and the name of the child with those of the defendant—16 CAL 781

Children in custody of mother —Where a mother has the custody of a child and has to maintain him she is entitled to claim maintenance on his account—2 Weir 630 And the father cannot refuse to maintain his children on the ground that they are living with their mother—8 BUR L T 131 If he wants to have them in his custody he must enforce his rights if any in the Civil Court—111 A divorced wife is under the Mahomedan law entitled to the custody of her children and the father is not thereby relieved of his liability to maintain them—6 BOM L R 536, 19 MAD 161

But where a child had left its father and has chosen to live with its mother who is leading a life of adultery since she left her husband, the father cannot be directed to pay an allowance to the child under this section—2 Weir 639

An offer by the father to maintain his children if they are left with him does not take away the Magistrate's jurisdiction under this section to order him to pay for their maintenance—1905 L B R (Cr P C) 39 *Contra*—1917 P R 22, 1891 P R 18 where it was held that a father offering to maintain his children on condition that they live with him cannot be said to refuse to maintain them, and he cannot therefore be ordered to pay for their maintenance

Effect of agreement—Obligation to maintain a child is a statutory obligation and parties cannot contract themselves out of it—L B R (1900 1902) 126 The father cannot divest himself of his liability to maintain his child by an agreement with his wife—2 Weir 648 The language of this section is inconsistent with the capacity of a wife to make a contract absolving her husband from his statutory liability—L B R (1905) 45 But it has been held in 2 Weir 631, that where the mother of illegitimate children renounced on their behalf all future claims of maintenance by a document on payment of certain sum by the father the Magistrate was not competent to pass any further order for maintenance unless there was proof of fraud in the execution of the document or unless it is proved that there was a valid subsequent oral agreement in supercession of the document A compromise by the lawful guardian of a minor acting *bonafide* for his benefit cannot be set aside even at his instance except upon proof of fraud—2 Weir 630

But there can be no doubt that when a compromise made by the guardian of a minor does not appear to be for his benefit and it is very likely that he would be materially injured by a manifestly inadequate adjustment of his maintenance claim under this section the compromise will not bind the minor nor any one acting as guardian after the mother's death—1895 P R 13

'UNABLE TO MAINTAIN ITSELF'—The words 'unable to maintain itself' refer to the child and not to the wife—10 BUR L R 166

The father is bound to maintain the child even though its mother may be able to maintain it The question as to the means of the mother is not to be taken into account, the true criterion is the inability of the child to support itself—7 BUR L T 31 The

fact that the child belongs to a well to do *tarwad* does not relieve the father from his liability to maintain it—25 M L J 355 The inability referred to in this section relates to the absence of sufficient maturity of physical and mental development in the child rendering it in consequence unable to earn its living by its own efforts and does not refer to inability through poverty or absence of all means—*Ibid* But in 39 MAD 957 and 19 MAD 461 it has been held that this section has no application to cases where the children are being maintained by a *tarwad* who is bound by law to maintain them The words 'unable to maintain itself' cannot be confined to the tender age of the child but have also reference to its financial position Therefore where there are enough funds to support the child in the *tarwad* to which it belongs it cannot be said to be unable to maintain itself—37 M L J 361

A child who is deaf and dumb and unable to maintain itself is entitled to maintenance even though it may have attained majority—5 N W P H C R 237 A minor girl earning her living by prostitution will still be considered to be 'unable to maintain herself' because prostitution is not to be treated as a profession by which a girl can maintain herself for the purpose of this section—37 MAD 365 But a minor married girl whose husband is willing to maintain her cannot be regarded as a person unable to maintain herself, and her father cannot be ordered to maintain her—2 Weir 650

The child is entitled to get maintenance until it is able to maintain itself the Magistrate is not justified in ordering maintenance 'till the child attains the age of 14' a Magistrate has no power to fix an arbitrary age limit up to which the child will get maintenance—2 P L T 109

Where a boy is aged 17 or 18 and is able to work and earn his living he cannot be said to be 'unable to maintain himself', and he cannot compel his father to educate him in a college and thus better his prospects—1 BUR L J 123

WHO CAN ORDER —Only the Magistrates enumerated in this section can inquire into the case and pass order for maintenance An inquiry under this section cannot be delegated by a First Class Magistrate to a Magistrate of a lower rank—2 Weir 617 A First Class Magistrate cannot refer an application under this section to a Subordinate Magistrate of lower grade and act upon his report—1905 P R 27, 11 MAD 199

ORDER FOR MAINTENANCE —The only order that can be passed under this section is either an order allowing for maintenance or an order dismissing the application for maintenance. He cannot pass any other order. Where a claim for maintenance is compromised by the consent of parties the Magistrate is not competent to pass an order in accordance with the terms of the compromise. He can only dismiss the petition and strike it off the file. To pass a decree in terms of the compromise would be to assume the functions of the Civil Court—2 Weir 629 2 Weir 630

The order under this section must not be conditional and must not have reference to any future circumstances. When the wife after compromising the claim for maintenance prived for an order of the Magistrate that if her husband failed to support her in future he should pay her a monthly allowance it was held that the Magistrate could not pass an order of this nature he must dismiss the application—2 Weir 630. An order for maintenance passed on condition that the woman resides in her husband's house is illegal—1917 P. R. 14

MONTHLY ALLOWANCE —The law empowers a Magistrate only to direct payment of a monthly maintenance. An agreement between a husband and wife whereby the husband agreed that he would furnish his wife with certain ornaments, build a house for her, deliver to her *annually* a certain amount of grain and pay her a certain sum in cash is not an agreement which can be made the basis of an order under this section and therefore can not be enforced under its provisions—6 MAD 283 21 Cr L J 612 (LALH). An order for the payment of a certain sum *annually* for value of clothes is not legal. But where a *razinamah* entered into between the parties contains an agreement to that effect the wife is entitled to ask the Court to give effect to the general intention of the parties as disclosed by the *razinamah* by allotting in the monthly allowance the value of the clothes agreed to be paid annually—2 Weir 634

Maintenance does not include school fees for children—U. B. R. (1909) 1st Qr (Cr P C) 17

The payment of maintenance must be in *money* an order for payment of maintenance in grain is not in accordance with the Code—2 Weir 626 2 Weir 627, 1911 P. R. 19 1887 P. R. 3

The payment ordered must be *monthly* payment. The law does not allow an order for the payment of two clothes *annually*—2 Weir 627

An order under this section fixing the duration of the period for which the maintenance is to be paid is illegal—2 Weir 634

AMOUNT OF MAINTENANCE—In determining the amount of maintenance no luxury should be allowed but necessities of life should be considered according to the station in life of the applicant and the means of the respondent—4 BUR L T 269 The maximum amount which can be awarded for the maintenance of each person is now Rs 100 under the old law it was Rs 50 Where a wife applied for maintenance of herself and her four children and the Magistrate ordered the husband to pay Rs 50 (under the old section) for maintenance of the wife and Rs 10 for each child every month it was held that the order was legal—4 BUR L T 139 But this decision was not consistent with the letter of the section which allowed Rs 50 *on the whole* These words should be taken to mean that the *aggregate* sum which could be awarded for the maintenance of wife and children must not exceed Rs 50

A prospective order providing for increase being made in the amount awarded for a child's maintenance hereafter as the child grows older is not justified by law—2 N W P H C R 454 A Magistrate cannot under this section make an order for maintenance at a progressively increasing rate He may, however under sec 489 from time to time alter the rate of monthly allowance granted under this section as the child grows older—12 CAL 535 14 MAD 398

The Magistrate shall order the amount to be paid to the wife or child as the case may be An order for the payment of the amount of maintenance at the Taluk Kutchery is not authorised by law—2 Weir 627

Order should specify amount payable to each person—An order under this section awarded Rs 42 for the maintenance of the wife and son but nothing was said as to what portion was to be for the wife and what portion for the son At the time the wife applied for enforcement of the order the son was over 19 years of age and earning sufficient for him to live on The Magistrate altered (under sec 489) the monthly allowance into Rs 25 payable to the wife only It was held that as regards the son the foundation of the order was taken away when he was able to maintain himself and became spent so far as he was concerned and was not enforceable, and that the Magistrate in the original order not having allotted any particular portion to the wife the order could not be partially enforced in

favour of the wife, but that she should make a fresh application for maintenance for herself alone—9 L B R 49

SUB SECTION (2) —The maintenance allowance is payable only from the date of the order (or at most from the date of the application) A direction to pay maintenance from a date prior to such date is opposed to this section—2 Weir 635 But where an order for such retrospective payment was made with the consent of the parties the High Court did not interfere—2 Weir 635

SUB SEC (3)—ENFORCEMENT OF ORDER —In this subsection the word “fails without sufficient cause” have been substituted for the words ‘wilfully neglects’ because of difficulties which have arisen in the interpretation of the word ‘wilfully’ Under the old law it was held that before an order for imprisonment* could be made on default of payment of maintenance strict proof was necessary that the nonpayment was due to wilful neglect on the part of the defendant—22 CAL 291 5 O C 316 25 CAL 291 Under the present law no such proof is necessary but simple non payment is sufficient to attract the provisions of this sub-section

Under this section the Magistrate can *imprison* the person proceeded against after default is made but he cannot take *security* from that person in anticipation of default—24 W R 72

Warrant —A warrant in respect of the breach of the order is a condition precedent to the inflicting of imprisonment—9 ALL 240 A Police officer when executing a warrant for the levy of the amount of maintenance recoverable under this section can break open an inner door of the house of the person against whom it is executed—Ratanlal 431

The law contemplates only a single warrant of commitment regarding arrears due at the time of issue Where six months' arrears are due separate warrant of commitment for each month's arrears is bid in law—25 CAL 291 The levy of accumulated arrears of maintenance by a single warrant and in one proceeding is not illegal—7 M H C R APP 38 6 M H C R APP 22

The second proviso (newly added) to this sub-section provides a period of limitation (one year from the date of default) within which the application is to be made for the issue of the warrant for realisation of the outstanding arrears

IMPRISONMENT —The imprisonment may be awarded only *after* default is made Where an order provided that in case of the defendant failing to pay the monthly allowance he should be im-

prisoned for a term of 15 days for every breach of the order, it was held that the order was in anticipation of the procedure to take place on a wilful default, if such should occur, and was therefore illegal—5 M H C R APP 34 Imprisonment is a means of enforcing payment, and an order for imprisonment can be passed only when there has been negligence to pay maintenance—22 CAL 291

Release on payment—The imprisonment awarded under this section is not a punishment for contempt of the Court's order, nor is it an absolute sentence. It is passed only for the unpaid portion of the maintenance, or in other words, it is owing to default of payment of the unrealised portion of the maintenance. Therefore, the imprisonment ought to cease upon payment of the amount of maintenance—22 CAL 291 The words "until payment if sooner made" did not occur in the 1882 Code, and therefore it was held in 8 MAD 70, and U B R (1892 96) 70 that a person committed to jail for non payment of maintenance was not entitled to be released even when the arrears were paid. The imprisonment ordered in default of payment was a punishment for breach of the order of the Court. These rulings are no longer good law.

Nature of imprisonment—The imprisonment under this section may be either simple or rigorous, looking to the terms of sec 2 (15) of the General Clauses Act—9 ALL 240 In Form XL not only simple but rigorous imprisonment is provided for, but it would be safer to confine the imprisonment to simple imprisonment—U B R (1892 1896) 70

Term of imprisonment—It has been held in 9 ALL 240, 6 M H C R APP 22 and 7 BUR L 3 225 that the maximum term of imprisonment is one month and that only one month's imprisonment can be awarded in default of payment of the aggregate of amounts due. In the Burma case the words 'for the whole or any part of each month's allowance remaining unpaid' have been interpreted to mean "for the whole or any part of every month's or all months allowance remaining unpaid". Such an interpretation seems to be too laboured. The more reasonable view has been taken in 20 MAD 3, 25 CAL 291 1877 P R 12. A person who has wilfully neglected to pay arrears of maintenance for several months may be imprisoned for more than one month—1877 P R 12 1919 P R 12. The imprisonment in default of payment of maintenance is not to be limited to one month. The procedure contemplated by the Code appears to be to ascertain how many months arrears are

due. The maximum imprisonment that can be imposed will then be *one month for each month's arrears* and if there is a balance representing the arrears for a portion of a month a further term of a month's imprisonment may be imposed for such arrears—20 MAD 3, 25 CAL 291

WHEN ORDER CANNOT BE ENFORCED—(1) Where a woman to whom maintenance has been ordered under this section subsequently voluntarily resides with her husband the original order becomes ineffectual, and if the husband again refuses to maintain her fresh proceeding must be instituted under this section—8 A W N 217

(2) When the husband on summons appears and pays the arrears of maintenance into Court the Magistrate cannot order imprisonment—1 A W N 19

(3) If the defaulter dies the order cannot be enforced against his estate—41 CAL 88

But the defendant's inability to pay is not a ground for the Magistrate's refusal to enforce the order for maintenance. If the allowance granted is too excessive he may revise the rate of maintenance on further enquiry, and the order will take effect from the date of such enquiry—2 Weir 636

OFFER TO MAINTAIN WIFE—Where the husband offers to maintain his wife and the wife consents to live with him the Magistrate cannot make an order under this section unless the complainant satisfies him that notwithstanding such offer there is just ground for making such order—1 C L J 214

The offer to maintain must be a *bona fide* offer and not made with the object of escaping obligation—13 Cr L J 55. But the fact that in the past he has neglected to maintain should not be considered as sufficient by itself to hold that the offer is not made in good faith—1917 P R 22. In 22 Cr L J 149 (LAH) it has been held that if it is found that the husband had formerly turned his wife out of his house his subsequent offer to keep her in his house cannot be taken to be *bona fide* and he cannot escape his liability to maintain her under this section merely by such an offer because he may break his promise as soon as she gets home.

The offer must be to maintain wife as wife. It has been however held in 16 BOM 269 that where the husband offered to keep the complainant in his house but not as wife (but as a servant or dependant) the offer was a sufficient offer within the meaning of this section. But

this decision does not seem to be just. The Madras High Court rightly lays down that an offer to maintain wife must be one to maintain her with consideration due to her position as wife—17 MAD 260, 2 Weir 641. And therefore where a Hindu husband having two wives offered to maintain his first wife in his own house adding that he would not live with her, but would supply grain for her to cook her own food and eat it separately in the house, such an offer was not a sufficient offer within the meaning of this section—6 MAD 371.

GROUND'S OF WIFE'S REFUSAL TO LIVE WITH HUSBAND—An order for separate maintenance in favour of the wife may be made under this section if the wife has just ground for refusing to live with her husband. Inability of husband and wife to agree to live together is not a ground for ordering separate maintenance for wife—6 W R 59. A Magistrate is not authorised to entertain an application for maintenance where the husband has neither ill-treated his wife nor has refused or neglected to maintain her but she of her own accord left her husband's house and protection—6 N W P H C R 205. When the wife voluntarily leaves her husband's house without sufficient justification, she is not entitled to any order this section, unless the husband refuses to maintain her, or turns her out or ill treats her, so as to make it impossible for her to live with her husband—5 BOM L R 614.

The following are proper grounds for the wife's refusal to live with her husband—

(1) *Cruelty*—Under the Code of 1882, cruelty was the only ground on which a wife was justified in living separate from her husband and demanding maintenance. But the words "that he habitually treated his wife with cruelty" which occurred in the Code of 1882 have been substituted by the words "that there is just grounds for so doing". This alteration gives the Magistrate larger discretion in giving maintenance. The present Code does not restrict the payment of maintenance when the wife is living separately, to cases of cruelty—4 BUR L T 269. There are other grounds on which the wife may live separately and claim maintenance.

(2) If a Christian husband reverts to Hinduism and marries a second (Hindu) wife the Christian wife may refuse to live with her husband, and apply for maintenance—4 M H C R APP 3.

(3) Adultery on the part of the husband although not punishable under the I P C may nevertheless constitute sufficient cause for the wife living separately from her husband, and enable her to

claim maintenance under this section—20 MAD 170, 13 ALL 348. Where the husband is living with a mistress in the house at the time of application the wife is entitled to refuse to live with him and a subsequent offer made by the husband in Court to give up his mistress does not deprive the wife of her right of refusal to live with her husband—14 ALL L R 210. But in such cases the Magistrate should take into consideration the social habits of the particular community to which the parties belong. If that community does not completely disapprove of concubinage and tolerates it so far as to give kept women some status and rights the fact that the husband keeps a concubine ought not by itself to entitle the wife to claim separate maintenance—20 MAD 170. The circumstance that a Hindu husband keeps a concubine in the house will not entitle a wife to an allowance for maintenance if her husband is willing to receive her and treat her with the consideration which is due to her position—2 Weir 641, 17 MAD 260.

(4) Where the breach between the husband and wife is irreparable and it is quite impossible for the latter to return to the former after many years separation without leading to fresh trouble and dispute she is entitled to maintenance by living separate from him—1914 P W R 20.

(5) The marriage of a Mohamedan with the step mother of his wife is not valid under Mohamedan law. The wife is entitled in such a case to say that she would not live with her husband during the continuance of such marriage—2 Weir 647.

(6) Where a Burmese Buddhist has taken a lesser wife without the consent of chief wife the latter can refuse to live with her husband at the same time and can claim maintenance—4 I B R 310. Also according to Burmese Buddhist law the fact that the husband took a second wife might be a good reason for the first wife's refusal to live with him unless he provides her with a separate residence—11 BUR L T 105.

The following are *not sufficient grounds* for the wife's refusal to live with her husband —

(1) The fact that the husband has married again does not entitle the wife to separate maintenance if the husband is willing to maintain her in his house—7 MAD 187, 1880 P B 27, 1882 P R 31, 1878 P R 2, 1877 P R 66, Batanlal 7, 1914 P R 12. Existence of a co-wife with whom the complainant had quarrels or the husband's want of affection for the complainant or his greater affection

for the co wife is not a valid ground of complainant's refusal to live with her husband—1901 P R 14 The fact that the younger wife will suffer annoyance from the elder wife and that the husband may not protect her from such annoyance is not a proper ground for the younger wife's refusing to live with her husband and claiming maintenance—1904 U B R 1st Qr (Cr P C) 10

(2) Minority of wife is not a ground for her not living with her husband, if the husband offers to maintain his wife in her house—1882 P R 1, though in such a case having regard to her tender age it might be better that she should live with her parents

(3) Where the husband is willing to maintain his wife, the fact that the prompt dower has not been paid is not a ground for separate residence and maintenance—1888 P R 6, 1880 P R 15

SUB SECTION (4) —“*Living in adultery*”—Living in adultery means following a course of adulterous conduct more or less continuous, a single act of adultery cannot be considered as living in adultery—5 N L R 19, 30 MAD 332 Where the wife, two years prior to the application for maintenance, had given birth to an illegitimate child, but since that time she had been living with her parents leading a chaste and respectable life she cannot be said to be living in adultery so as to disentitle her to maintenance—26 ALL 326

In the following cases *past* adultery of wife was held sufficient to disentitle her to maintenance, although she was not living in adultery *at the time of application* Thus where a woman committed adultery with a man of low caste and was expelled from her caste, thereby making it impossible for her husband to live with her she could not claim maintenance although at the time of application she was not living in adultery—31 MAD 185 Where the wife deserted her husband many years ago and led a life of adultery and has not attempted to seek her husband's pardon for past misconduct the wife was not entitled to maintenance merely because she was not living in adultery at the time of making the application for maintenance—Ratanlal 506

There must be *clear proof* of adultery The mere fact that the husband considers the wife's conduct open to suspicion is not sufficient—2 Weir 617 A mere suspicion by the husband that the child of the wife was the result of her intimacy with another man is not a ground of refusing maintenance—1 A W N 37 The mere fact that the panchayet of the brotherhood condemned the wife's conduct &

not a ground for dismissing an application for maintenance, and the Magistrate should have inquired whether the wife was living in adultery—1 A W N 62

"Refuses to live with her husband" —See notes under sub-section (3) Where a Hindu wife leaves her husband's house without good cause her right of maintenance is only suspended, and she has the right to return to her husband's house and claim maintenance—12 S L R 90

"Living separately by mutual consent" —A wife is not entitled to maintenance from her husband when both have entered into an agreement which provides for their living separately by mutual consent, and they are actually living separately in terms of that agreement—Ratanlal 870 Where it appeared that by mutual consent the husband and wife have been living separately for a number of years and that the maintenance of the wife was by arrangement made at the time they began to live separately provided for by the assignment to her of some land the Magistrate had not jurisdiction to make an order under this section—2 Weir 648

To bring the case within sub-section (4) it must be shown that the husband and the wife have lived apart by a definite contract mutually made between them. A contract voluntarily and freely made and entered into between the parties is essential. Where therefore a husband and wife are living apart in obedience to the decree of a Panchayet of their castemen by which the wife is awarded maintenance it cannot be said that they are living apart by mutual consent—4 P L J 109

SUBSECTION (5) —CANCELLATION OF ORDER —Under this sub-section an allowance granted to the wife only can be cancelled. An allowance granted to a *child* cannot be cancelled though it may be altered under Sec 480—1885 P R 17. An order for maintenance of child of a divorced Mahomedan wife who has married again cannot be cancelled under this section. Such an order can be cancelled only on the ground of change of circumstances mentioned in Sec 482—27 All 11

"Is living in adultery" —An order granting maintenance to a wife can be cancelled under this sub-section upon proof that the wife is living in adultery *subsequent* to the order—Ratanlal 323 8 B H C R 124, 5 All 224 But adultery previous to the order of maintenance is not admissible in evidence to cancel the order. An order cancelling maintenance on the grounds of facts

antecedent to the order granting maintenance is illegal on the principle of *resjudicata*—5 ALL 224 Past adultery is admissible under sub-section (4) *before* passing an order of maintenance, but after an order is passed, such past adultery cannot be considered for the purpose of cancelling the order

There must be sufficient evidence of adultery The fact that the wife continually went to the bazar or that men went to the house where she lived (especially when other people including the wife's mother lived in that house) is not sufficient evidence to lead to the conclusion that the wife was living in adultery—13 A W N 56 Where the husband alleges adultery, the Magistrate should make enquiry and adjudicate upon such allegation—1902 P R 36, 2 A W N 168

Divorce and dissolution of Marriage —An order can be cancelled on the ground of divorce Where the husband pleaded in answer to an application for enforcement of the order of maintenance, that he has lawfully divorced his wife and such plea is proved, the Court will decline to enforce the order for the period subsequent to the date when the marriage ceased to exist—19 ALL 50, 17 N L R 92 The apostasy of a Mohamedan wife *inso facto* dissolves the marriage and the wife therefore is not entitled to maintenance from her husband—9 I. B R 206 In case of Mohamedans the order becomes inoperative on the expiry of the period of *iddat* after divorce—13 BUR L T 43

Disputed Compromise —Where the wife denied the validity of an alleged deed of compromise by which the parties agreed to a reduction in the rate of the allowance ordered by the Magistrate it was held that the Magistrate was not competent to cancel the order for maintenance until the agreement has been declared by a competent tribunal to be binding on the wife—2 Weir 619

Application to whom to be made —An application for the cancellation of an order of maintenance must be made to the Magistrate who made the original order or to his successor-in-office—25 ALL 515

Sub-section not exhaustive —This sub-section is not exhaustive of the grounds on which an order for maintenance may be cancelled For instance, the divorce of the wife is a ground on which the Mohamedan husband can apply for cancellation of the order granting maintenance to the wife See 19 ALL 50 17 N L R 92 cited above and 19 W. R 73 Similarly where the father was ordered to pay maintenance to his daughter, the marriage of the daughter makes her

maintenance a charge on her husband and not on her father, and the father may apply for cancellation of the order—2 Weir 650 But these grounds are neither mentioned in this sub-section, nor are they covered by Sec 489 which speaks only of alteration of allowance and not of *cancellation* of maintenance order Therefore it is suggested that either this sub-section should be made more comprehensive, or the language of Sec 489 should be so altered as to cover the above cases See notes under Sec 489

SUB SECTION (6) —EVIDENCE — An order under this section must be passed on proof in the proceedings, and not upon knowledge acquired by him in some other case—8 W R 67, and the various elements required to sustain an order under this section must be strictly proved by evidence recorded on oath—13 W R 19 An order for payment of maintenance without recording evidence and without examining any witnesses is illegal—2 Weir 628

Where a Magistrate instead of examining the applicant at length and her witnesses got her only to verify on oath the truth and correctness of her application and treating her application as legal evidence against the husband passed an order of maintenance, held that the order was bad—23 O C 237

Proceedings under this Chapter are judicial in their nature and should not be conducted as if they were ministerial matters The notes of evidence therefore should not be vague or inadequate and the order recorded must be issued on distinct findings of fact—5 ALL 224 If however an order is made with consent of parties the necessity of taking evidence may be dispensed with—2 Weir 629

The evidence must be recorded as provided by Sec 355 Proceedings under this Chapter cannot be conducted as in a summary trial under Chapter XXII—20 CAL 351

Presence of the defendant —As directed by this subsection the inquiry should be conducted in the presence of the person proceeded against A proceeding under this section should not be conducted *ex parte* Evidence should be taken in the presence of the defendant or his pleader unless the Court was satisfied that the defendant was willingly avoiding service of summons or neglecting to attend the Court proceedings should not be taken *ex parte*—1 C L J 102 Proceedings can be conducted in the presence of the pleader, only when the personal attendance of the defendant has been dispensed with Where his attendance has not been dispensed with, the Court is justified in refusing to hear the Munkhtear by whom he was repre-

sent, and the Court ought to insist upon the presence of the defendant and should not proceed *ex parte*—2 BOM L R 700

Under the proviso to this sub-section, the Magistrate may proceed *ex parte*, if he is satisfied that the defendant was willingly avoiding service and neglecting to attend the Court. But in every case of absence of the defendant the Court ought not to treat the absence as due to wilful neglect—2 BOM L R 700. A Court ought not to infer that the defendant was neglecting to attend the Court, when the inability to attend was due to the absence of specification in the summons of the place where he was to appear—7 M H C R APP 43

Presence of complainant—This section does not require the personal attendance of the complainant. If the complainant be a *pardanashin* lady her presence may be dispensed with—1903 P R 19. In 1 C L J 214 and U B R (1892-96) 64, however, the Magistrate dismissed an application for maintenance for default of appearance of the complainant.

SUB SECTION (9)—VENUE—This sub-section did not occur in the 1872 and 1882 Codes and it was therefore held that the application must be heard by the Magistrate within whose jurisdiction the wife resided—13 ALL 348. 5 N W P H C R 237. These decisions are no longer good law. Under the present Code, the proper Court to take cognizance of a complaint by the wife under this section is the Court within whose jurisdiction the husband or the father, as the case may be, resides—See 24 CAL 638, 9 BOM 40. 1885 P R 13, 1893 P R 3. This sub-section does not give the wife or child to select a *forum* other than that where the husband or father is then residing or last resided with the complainant—1904 U B R 1st Cr (Cr P C) 10.

Where the husband pays occasional visits to his wife, he cannot be said to reside occasionally at the place where the wife resides in as to give jurisdiction to the Magistrate of that place—24 O C 219, 5 S L R 220. But a man may be said to reside with the mother of the illegitimate child if he visits her only occasionally at her settled abode so long as he has the intention of continuing to visit her, and where she has no permanent residence elsewhere, two months' stay at a place where she is occasionally visited by the father of the children is sufficient to constitute that place as his residence for the purpose of this sub-section—5 S L R 220. In 21 C W N 872 however temporary residence was held sufficient to give jurisdiction to the

Magistrate of that place. Thus where it appeared that the husband ordinarily resided outside Calcutta but was temporarily there on the date the application was filed and for some days previously, it was held that this temporary residence gave the Calcutta Court jurisdiction under this sub-section.

MISCELLANEOUS —CIVIL SUIT FOR MAINTENANCE —

Where the right to maintenance is conferred by this section as well as by the personal law of the parties the right can be enforced not only by this section but also by a civil suit for maintenance. But where the right is not conferred by the personal law of the parties (e.g. the right of the illegitimate children of a Hindu by a non-Hindu woman to get maintenance from their putative father) such right cannot be enforced by a civil suit and the only remedy is that provided by this section. The distinction between a remedy under the common law and a remedy under this section is that the right under the common law may be enforced not only against the father during his lifetime but also against his estate after death but a right under this section does not survive the death of the father—27 MAD 13

An order under this section passed by a Magistrate does not take away the jurisdiction of the Civil Courts—30 MAD 400 A Magistrate's order for maintenance does not bar the jurisdiction of the Civil Court to make a declaration that the husband is not liable to pay separate maintenance to his wife—2 WEIR 615 In spite of an order for maintenance of illegitimate children passed by a Magistrate, a civil suit is maintainable for a declaration that the children are not the children of the plaintiff—17 O C 331 1 BUR L J 82 Similarly an order of a Magistrate refusing maintenance does not bar a suit in a Civil Court for maintenance—32 CAL 479 Contra—18 ALL 29 and 2 WEIR 614 where it has been held that a Magistrate's order for maintenance of wife duly made under this section cannot be superseded by a decree of the Civil Court declaring that the wife was not entitled to any maintenance. See also 11 C P L R 72 where it was held that a Civil Court has no jurisdiction to entertain a suit for a declaratory order as to the paternity of an illegitimate child, whose maintenance has been ordered under this section.

A civil Court has no jurisdiction to cancel an order for maintenance passed under this section or to grant an injunction against a criminal Court, but when the Civil Court has issued a declaration,

sented, and the Court ought to insist upon the presence of the defendant and should not proceed *ex parte*—2 BOM L R 700

Under the proviso to this sub-section, the Magistrate may proceed *ex parte*, if he is satisfied that the defendant was willingly avoiding service and neglecting to attend the Court. But in every case of absence of the defendant the Court ought not to treat the absence as due to wilful neglect—2 BOM L R 700. A Court ought not to infer that the defendant was neglecting to attend the Court, when the inability to attend was due to the absence of specification in the summons of the place where he was to appear—7 M H C R APP 43

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Magistrate of that place. Thus where it appeared that the husband ordinarily resided outside Calcutta but was temporarily there on the date the application was filed and for some days previously, it was held that this temporary residence gave the Calcutta Court jurisdiction under this sub-section.

MISCELLANEOUS — CIVIL SUIT FOR MAINTENANCE —

Where the right to maintenance is conferred by this section as well as by the personal law of the parties the right can be enforced not only by this section but also by a civil suit for maintenance. But where the right is not conferred by the personal law of the parties (e.g. the right of the illegitimate children of a Hindu by a non-Hindu woman to get maintenance from their putative father) such right cannot be enforced by a civil suit and the only remedy is that provided by this section. The distinction between a remedy under the common law and a remedy under this section is that the right under the common law may be enforced not only against the father during his lifetime but also against his estate after death but a right under this section does not survive the death of the father—27 MAD 13

An order under this section passed by a Magistrate does not take away the jurisdiction of the Civil Courts—30 MAD 400. A Magistrate's order for maintenance does not bar the jurisdiction of the Civil Court to make a declaration that the husband is not liable to pay separate maintenance to his wife—2 Weir 615. In spite of an order for maintenance of illegitimate children passed by a Magistrate, a civil suit is maintainable for a declaration that the children are not the children of the plaintiff—17 O C 331. 1 BUR L J 82. Similarly an order of a Magistrate refusing maintenance does not bar a suit in a Civil Court for maintenance—32 CAL 479. Contra—18 ALL 29 and 2 Weir 614 where it has been held that a Magistrate's order for maintenance of wife duly made under this section cannot be superseded by a decree of the Civil Court declaring that the wife was not entitled to any maintenance. See also 11 C P L R 72 where it was held that a Civil Court has no jurisdiction to entertain a suit for a declaratory order as to the paternity of an illegitimate child, whose maintenance has been ordered under this section.

A civil Court has no jurisdiction to cancel an order for maintenance passed under this section or to grant an injunction against a criminal Court but when the Civil Court has issued a declaration,

the party who has obtained it can apply to the Criminal Court for an order to stay the payment of maintenance—1 BUR L J 82

EFFECT OF CIVIL COURT DECREE —*Effect of previous decree* —A Civil Court's decree cannot be disturbed by an order of the Magistrate. Where a decision for a monthly allowance for maintenance has been obtained in the Civil Court and is in force the Magistrate is not competent to order a further and separate maintenance—2 WEIR 615. The jurisdiction vested in the Magistrate is ancillary to that of the Civil Court and it is not open to a Magistrate to ignore a final decree of a Civil Court on the ground that it rests on reasons which do not appear to him satisfactory—2 WEIR 615. Where the husband has obtained a decree for restitution of conjugal rights, and the decree is in force, no application for maintenance by the wife ought to be entertained by the Magistrate—U B R (1910) 1st Qr 34. Where a Civil Court has declared that the child is not the child of the defendant, the Magistrate should treat the decree as conclusive on the question of relationship and should refuse to pass any order for the maintenance of the child—33 M L J 449.

Effect of subsequent decree —Where an order is passed by a Magistrate under this section for maintenance against the husband and in a subsequent suit by the husband in the Civil Court for restitution of conjugal rights a consent decree is passed allowing the wife maintenance and residence *held* that the decree of the Civil Court will supersede the Magistrate's order—27 I L J 483. The decree of a Civil Court for restitution of conjugal rights supersedes any previous order of a Magistrate for maintenance if the wife should persist in refusing to live with her husband. The Magistrate ought to cancel his order or rather to treat it as determined if the wife failing to comply with the decree for restitution refuses to live with her husband—23 BOM 481, 9 BUR L T 162. 13 BOM 885. See the new sub-section (2) of sec 489. Where a decree for restitution of conjugal rights imposing certain conditions on the husband is passed against a wife who has obtained an order for maintenance non-compliance by the husband with the condition of the decree would reverse the right of the wife to claim maintenance and to have the order enforced—1906 P R 1.

When the Civil Court finds that the relationship of husband and wife has ceased to exist the husband is entitled to ask the Magistrate enforcing the order of maintenance to abstain from giving

further effect to the order—14 CAL 276 Where a Civil Court has decided any points which would disentitle the wife to maintenance, the Magistrate who had passed an order for maintenance, will be bound in the interests of justice to take the judgment into consideration before passing a fresh order to enforce the former order—2 Weir 614 A Magistrate's jurisdiction to settle maintenance made under this section is auxiliary to that of the Civil Court Therefore, a Civil Court decree declaring that A is not the child of B supersedes a Magistrate's previous order for A's maintenance and the Magistrate is justified in refusing to enforce the Criminal Court's order after the Civil Court decree is passed—16 Cr L J 609 (OUDH), 13 BUR L T 104

FRESH APPLICATION —It is not competent for a Magistrate to hold a second enquiry into the same allegations which have once been already inquired into and dismissed by a competent Court—1916 P R 24, 17 Cr L J 106 (CAL) But the Magistrate can entertain a subsequent application for *fresh* cause shown There may be change of circumstances which would enable the applicant to come into Court again, not on the same ground but on a new ground—U B R (1892 96) 61, 2 Weir 633

But if the previous application had been dismissed for default of appearance and there was no adjudication regarding the merits, a second application is entertainable—24 C W N 32 30 C L J 128, *Contra*—1 C L J 214, where it was held that if an application under this section is dismissed for default the law does not empower the Magistrate to rehear the application

DIVORCE AFTER ORDER —An order for maintenance does not deprive the husband of his right to divorce his wife and after such divorce the Magistrate's order cannot be enforced—7 BOM 180

FURTHER INQUIRY —When an order under this section is refused by a Magistrate the District Magistrate cannot order further inquiry under sec 436—17 C P L R 127 25 ALL 345

APPEAL —When a Magistrate orders maintenance under this section no appeal lies as there is no conviction of an offence—7 W R 10, 5 B H C R 81

NO LIMITATION —A wife does not lose her right of maintenance because she has delayed in making the application—2 Weir 616 The law has not fixed any time within which a claim of maintenance is to be made The fact that the wife has not advanced her claim immediately on her husband's desertion of her does not disen

title her to maintenance—2 WEIR 615 The second proviso to sub-section (3) applies to an application for the issue of a warrant for enforcement of the order and not to an application for maintenance

NATURE OF PROCEEDINGS UNDER THIS SECTION—A proceeding under this section is of a criminal nature, and therefore—(1) it is a criminal case within the meaning of Sec 528 and the District Magistrate may withdraw a case instituted under this section from the file of a first class Magistrate to his own file—1905 P R 5 (2) No appeal lies under clause 15 of the Letters Patent against the order of a single Judge made on a revision petition against the order of a Magistrate under this section, as the order is one passed in a criminal trial—17 M L T 330 (3) If the parties to the proceedings compromise the claim for maintenance, the Magistrate cannot pass an order in accordance with the terms of the compromise, because to do so would be to assume the functions of a Civil Court—2 WEIR 629

Contra—Bastardy proceedings under this section are civil proceedings within the meaning of Sec 120 of the Evidence Act, and the defendant thereto may give evidence on his own behalf—16 CAL 781. Proceeding under this section being a proceeding of civil nature, a wife can be examined to prove non access of her husband during married life, without independent evidence being at first offered to prove the illegitimacy of the children—18 BOM 468

But though the proceeding under this section is of a criminal nature, still the person proceeded against under this section cannot be called an *accused*, he can be examined as a witness and oath can be administered to him—17 C P L R 127 See section 310 (2) The word 'accused' was formerly inadvertently used in sub-section (9) The Legislature has discovered the error and replaced the word by the words "any person" This section is not intended to be punitive but a preventive one, and hence the neglect or refusal to pay maintenance is not an 'offence' within the meaning of section 4—1893 P R 15 and an application for maintenance is not a complaint of an offence—1885 P R 26, 17 C P L R 127 Compensation cannot be awarded under section 250 to the person proceeded against if the complaint is dismissed—6 M L T 261

REVISION—The High Court has jurisdiction to set aside or modify the Magistrate's order, if the rate of maintenance awarded appears to be excessive, or to order further inquiry with a view to decide what amount should be allowed—M H C PRO 29—7—1867

The High Court can set aside in revision a previous order of a Criminal Court passed under this section in view of a subsequent decree of a Civil Court—16 Cr. L. J. 600 (OUDH)

489. (1) On proof of a change in the circumstances of a person receiving under S. 488 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife or child, the Magistrate may make such alteration in the allowance as he thinks fit. Provided that if he increases the allowance the monthly rate of *one hundred* rupees in the whole he not exceeded.

(2) *If here it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 488 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly*

CHANGE—In sub-section (1) the words 'one hundred' have been substituted for the word 'fifty,' and sub-section (2) has been newly added, by the Cr. P. Code Amendment Act 1923

SCOPE—This section furnishes the ground on which the Court passing an order under sec. 488 can modify that order. An order of a competent Court under sec. 488 for the maintenance of a child can be modified only under this section—27 ALL. II. When a maintenance order is made with reference to the means of the husband, he should apply under this section, if he is aggrieved for reduction of the allowance—9 W. R. 1. The revision of an order of maintenance and the grant of it on a lower scale than that of the original order is not legal, without an application under this section from one of the parties and without proof of change of circumstances—2 Weir 628

An application under this section can be made so long as there is a subsisting order under section 488. Thus an order awarding maintenance to the wife was passed in 1910, afterwards in 1912 the husband obtained a decree for restitution of conjugal rights but he never executed it and went on paying the maintenance to his wife as before. In 1918, the wife applied for increase of the amount of maintenance under sec. 489. *Held* that this application can not be granted because there was no subsisting order under section 488, the same having been put an end to by the decree of 1912. The fact that

the husband continued to pay the maintenance inspite of the decree of 1912 did not keep the order of 1910 alive—43 BOM 885

CHANGE OF CIRCUMSTANCES —The expression 'change in the circumstances' in this section means not merely a temporary or accidental change in one of such circumstances (such as salary) but a change in all circumstances connected with the condition of the person—11 A W N 32

The change of circumstances in this section is a change of pecuniary or other circumstances of the party paying or receiving the allowance, which would justify an increase or decrease of the amount of the monthly payment originally fixed, and not a change in the status of the parties, which would entail stoppage of the allowance—19 ALL 50 The words 'alteration in the allowance' clearly indicate that the section refers to such change of circumstances as would necessitate only an alteration in the amount of allowance and not to circumstances (*e g*, divorce) which entail the total discontinuance of allowance altogether—5 ALL 226 (per Mahmood J) Circumstances which necessitate not merely an alteration in the allowance but a cancellation of the order of maintenance should come under subsection (5) of section 488, and that sub-section should be made much more comprehensive in its terms See notes thereunder If, however the Legislature intends that those circumstances should come under this section, in that case the language of this section should be altered As it stands, it cannot include those circumstances The words 'alteration in the allowance' are opposed to such interpretation

The growth of the child or the birth of another child or the death of a child is a change in the circumstances—11 MAD 378, 12 CAL 535 The fact that the children are grown up and are no longer unable to maintain themselves amounts to a change in the circumstances—19 Cr L J 160 (BUR) 9 L B R 19 Where a divorced Muslim woman has married again the fact that the second husband has merely undertaken to maintain her child by first husband, does not empower the Magistrate to cancel the maintenance order passed against the first husband or to direct him to pay maintenance There is no such change of circumstances as to entitle the Magistrate to do so—27 ALL 11 The fact that the child has been adopted by another person does not entitle the Magistrate to cancel the maintenance order passed against the first husband by howsoever the child; perhaps the Magistrate may do so if circumstances are such as to entitle him to do so

The change of circumstances must be actual and of such a nature that the law would recognise it. The mere fact that the wife might possibly be able to earn something by her own labour is not a ground on which the husband may apply for reduction of the rate of allowance—7 A W N 107 because the law does not compel a wife to work to earn her livelihood while her husband is living and has sufficient means to maintain her. If the parties subsequent to an order under sec 488 make an agreement modifying its terms such agreement would amount to a change in the circumstances and the party interested can apply under this section and get the order modified—20 ALL 165

ALTERATION OF ALLOWANCE —Alteration does not mean cancellation. See notes above and under section 488 (a)

An order of alteration of allowance under this section cannot take effect retrospectively. The Magistrate has no power to reduce the rate of maintenance which has already accrued due. His order will take effect in respect of the allowance that will fall due after the date of the order—2 Weir 650. The arrears which have fallen due will be enforced at the rate originally fixed.

When an application for modification of the allowance has been preferred under this section the Magistrate cannot inquire into the propriety or otherwise of the previous order of maintenance—2 Weir 650

An application for alteration of allowance is no ground for staying the execution of an order of maintenance already granted. It is that order carries with it all the proper consequences so long as it remains in force—22 CAl 291

The amount of maintenance payable to each person must be specified otherwise it cannot be altered. See 9 I B R 19 cited under Sec 488 under heading Amount of maintenance

SUBSECTION (2) *—See notes under section 488 under heading Effect of Civil Court decree

490. A copy of the order of maintenance shall be given for enforcement of order without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid, and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the

identity of the parties and the non payment of the allowance due

ANY MAGISTRATE —An order under Sec 488 can be enforced by a second class Magistrate if the person against whom the order is passed resides within his jurisdiction—Ratanlal 288

The words 'any Magistrate of any place where the person against whom it is made may be' do not deprive the Magistrate who has made the order of his power to enforce the order under Sec 488 (3). When the defendant is beyond his jurisdiction he may issue a warrant for collection of arrears of maintenance or refer the applicant to the Magistrate having jurisdiction at the place where the defendant is to be found—4 MAD 230. The application for an order to enforce the recovery of maintenance may be made either to the Magistrate who passed the original order or to the Magistrate having jurisdiction over the place where the person resides. The provisions of this section cannot be held to derogate from the provisions of Sec 188 (3)—7 L B R 116

POWERS AND DUTIES OF THE MAGISTRATE —It has been held in 25 ALL 163 that a Magistrate to whom an application has been made to enforce an order of maintenance should not take into consideration anything further than the identity of the parties and the non payment of the allowance. He may also consider whether the person (in case of Mahomedans) to whom maintenance is ordered still holds the position of wife. No further steps relaxing the clear words of Sec 490 should be allowed. The fact that the parties had made an agreement subsequent to the order modifying its terms is not a matter for the consideration of the Magistrate enforcing the order. If the person against whom an order for maintenance is made considers that such order should no longer be in force against him it is for him to apply under Sec 489 and get the order altered. It is not suitable or expedient that it should be open to a second Magistrate to call in question an order duly given upon proof.

But a wider view has been taken in 10 V 113. In this case it has been held that the answer to an application for enforcement of an order is that the claimant has been released and has received the sum in satisfaction of her claim. The defendant pleads and denies the order.

But there can be no doubt that the Magistrate enforcing the order should take into consideration the question whether the person to whom the order has been given, is at the time she makes the application still holding the position of wife, on this point, there is no conflict of opinion between the High Courts. See 25 ALL 165, 19 ALL 50, 1894 P R 21, 17 O C 260, 1915 U B R 1st Qr 53.

The Magistrate enforcing the order is also bound to consider a Civil Court decree passed subsequent to the order of maintenance. If the Civil Court has decided that the complainant is not and never had been the wife of the defendant the Magistrate must refuse to enforce the order for maintenance—9 O C 49. For further notes as to the effect of Civil Court decree see under sec 488.

CHAPTER XXXVII

DIRECTIONS OF THE NATURE OF A HABEAS CORPUS.

491. (1) *Any High Court* may whenever it thinks fit

Power to issue direct—
tions of the nature of
a *habeas corpus*

- (a) that any person within the limits of its *appellate criminal jurisdiction* be brought up before the court to be dealt with according to law,
- (b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty,
- (c) that a prisoner detained in any jail situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court;
- (d) that a prisoner detained as aforesaid be brought before a Court-martial or any Commissioners acting under the authority of any commission from the Governor General in Council for trial or to be examined touching any matter pending before such Court-martial or Commissioners respectively;
- (e) that a prisoner within such limits be removed from one custody to another for the purpose of trial and

(f) that the body of a defendant within such limits be brought in on the Sheriff's return of *cepi corpus* to a writ of attachment

(2) The High Court may, from time to time, frame rules to regulate the procedure in cases under this section

(3) Nothing in this section applies to persons detained under the Bengal State Prisoners Regulation, 1818, Madras Regulation II of 1819 or Bombay Regulation XXV of 1827, or the State Prisoners Act, 1850, or the State Prisoners Act, 1858

CHANGE —This section has been amended by the Criminal Law Amendment Act, 1923 Under the old law, power under this section was given only to the High Court at Calcutta Madras and Bombay under the present section power is given to *all* High Court Under the old law the jurisdiction of the High Court in respect of proceedings under this section was confined to the limits of its original jurisdiction (44 CAL 76 and 46 CAL 52) under the present section the jurisdiction has been extended to mofussil places See 43 M L J 396 (T B)

High Court's power not taken away by the Extradition Act — The High Court's power to issue a writ of *habeas corpus* has not been taken away by the procedure provided in the Indian Extradition Act, sec 3 sub sections (6) and (7) —46 CAL 52 The High Court has power to issue an order and to examine whether a person detained in public custody under the Extradition Act is legally detained and this power is not taken away merely because the Government have already issued a warrant for surrender under sec 3, sub section (8) of that Act —39 CAL 164

Clause (b) —Custody of children —The High Court before passing an order in respect of a minor child ought to take into consideration the interest and welfare of the child —12 BOM L R 891 The Court will not ordinarily force a child to remain in a custody to which the child objects and before deciding as to its custody the Court will take account of the wishes of the child if it is old enough to form an intelligent preference —33 MAD 288 Where a mother had for eight years neglected her child who had been educated at a mission school the High Court refused her application for custody of the girl aged 15 years on the ground that if granted it would be detrimental to the welfare of the child —16 BOM 307 Where the father has delegated the guardianship of his children to another

person the question whether the father is entitled to resume the guardianship depends on the children's interests and welfare—38 MAD 807 P C (*In re Besant's case*)

Legal—When a petitioner obtains a rule calling upon the other side to show cause why a child should not be delivered to her, and the rule is discharged the order discharging the rule is a judgment within the meaning of clause 15 of the Letters Patent and is therefore appealable—14 BOM 555

491-A. *Any High Court established by Letters Patent*

Powers of High Court outside the limits of appellate jurisdiction may exercise the powers conferred by s 491 in the case of any European British subject within such territories, other than those within the limits of its appellate Criminal jurisdiction as the Governor General in Council may direct

This section has been newly added by the Cr Law Amendment Act, 1923. By this section European British Subjects even when outside the limits of British India will get the privilege of obtaining writs in the nature of *Habeas Corpus* from the High Courts

PART IX SUPPLEMENTARY PROVISIONS CHAPTER XXXVIII

OF THE PUBLIC PROSECUTOR

492. (1) The Governor General in Council or the Local Power to appoint Government may appoint, generally, Public Prosecutors or in any case, or for any specified class of cases, in any local area one or more officers to be called Public Prosecutors

(2) * * The District Magistrate, or, subject to the control of the District Magistrate, the Sub-divisional Magistrate, may, in the absence of the Public Prosecutor, or where no Public Prosecutor has been appointed, appoint any other person, not being an officer of police below *such rank as the Local Government may prescribe in this behalf*, to be Public Prosecutor for the purpose of *any case*.

CHANGE—*Firstly*, the words 'In any case committed for trial to the Court of Session' in the beginning of subsection (2) have been omitted because the necessity of appointing a Public Prosecutor in the absence of that officer may arise not only in Sessions

Courts but in all other instances, *Secondly* the italicised words have been substituted in place of the words "the rank of Assistant District Superintendent" because "as there is a variety of nomenclature of the Police officers we think it better to leave it to the Local Governments to prescribe the rank of police officers who may be appointed Public Prosecutors for the purposes of a particular case (*Report of the Joint Committee 1922*)

493. The Public Prosecutor may appear and plead

Public Prosecutor without any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal, and if any private person instructs a pleader to prosecute in any Court any person in any such case, the Public Prosecutor shall conduct the prosecution, and the pleader so instructed shall act therein, under his directions

Pleader privately instructed—Counsel instructed and retained by a private individual can watch the case on behalf of his client but he cannot without being specially empowered by the District Magistrate conduct a prosecution before a Sessions Judge—O S C No 31, 1888 P R 29

The Public Prosecutor may always avail himself of the services of counsel retained by a private individual but in doing so he does not deprive himself of the management of the case—11 B H C R 102

494. Any Public Prosecutor appointed by

Effect of withdrawal from prosecution the Governor General in Council or the Local

Government may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person, and upon such withdrawal,—

494. Any Public Prosecutor

* * * * may, with the consent of the Court, in cases

tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person *either generally or in respect of any one or more of the offences for which he is tried* and upon such withdrawal,—

(a) if it is made before a charge has been framed, the accused shall be discharged;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted.

(a) if it is made before a charge has been framed, the accused shall be discharged *in respect of such offence or offences.*

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted *in respect of such offence or offences.*

CHANGE —This section has been amended by the Cr P C. Amendment Act, 1923. The reasons are stated below.

SCOPE OF SECTION —Under the old law this section applied only to Public Prosecutors *appointed by Government*. A Prosecutor especially appointed by the Magistrate under sec 492 (2) to conduct a case had not the power to withdraw from the prosecution under this section—8 ALL 291, 2 Weir 653. A Government Pleader who was not appointed a Public Prosecutor under the provisions of sec 492 (1) could not withdraw from the prosecution under this section. He could withdraw only under sec 240 *et seq.*, only in cases where several charges had been preferred against the same person and he had been convicted on one of them—2 Weir 258. The present section as now amended will confer the power of withdrawal on all Public Prosecutors.

No person other than the Public Prosecutor can withdraw from the prosecution, even a Vakil acting under the directions of the Public Prosecutor cannot do so. But if the prosecution is withdrawn by the Public Prosecutor and the Vakil and the application for withdrawal of the case is signed by both the persons the withdrawal is not invalid—46 CAL 700.

This section (as well as section 495) does not apply to security proceedings. It applies only to proceedings which can end in a discharge or acquittal of the accused, but security proceedings do not contemplate the frame of a charge at all and as the result of the proceedings neither an order of discharge nor one of acquittal is to be passed therein—36 MAD. 315.

WITHDRAWAL FROM PROSECUTION —The Public Prosecutor cannot withdraw a case on the ground that the complainant

was keeping out of the way and could not be served with summons He should take steps to enforce his attendance—2 Weir 655

The complainant has no *locus standi* in the matter of withdrawal of prosecution When a case has been started upon a police report and the Court Sub Inspector (who is the Public Prosecutor) wants to withdraw the case the Court cannot reject the application for withdrawal simply because the complainant wants to proceed with the case—1 P L T 400

Withdrawal of some of the charges—Under the old section, a Public Prosecutor was not competent to withdraw *only one* of the charges If he withdrew at all he had to withdraw *all* the charges Where one of the charges was withdrawn and the accused was tried on the other charges the High Court ordered the trial on the charge withdrawn—2 C L J 18 (n) But the law has now been changed and this section empowers the Public Prosecutor to withdraw *one or some* of the charges

RECORD OF REASONS—When a Court acting under this section gives its consent to a withdrawal from a prosecution, it should record its reasons in order that the High Court may be in a position to say whether the discretion vested in the Court has been properly exercised—22 C W N 69, 48 CAL 1105, 26 C W N 880 The Madras High Court holds that no reasons are to be recorded by the Judge—5 M L T 216

ACQUITTAL—If the Public Prosecutor withdraws from the case after a charge is framed, he must be *acquitted* under clause (b), and not *discharged*—12 MAD 35 Where therefore a prisoner, the charge against whom was withdrawn by the Public Prosecutor, was discharged instead of being acquitted and was again committed to the Sessions on a second charge for the same offence, it was held that the conviction was bad in law—12 MAD 35

Where a person is acquitted on the charge being withdrawn by the Public Prosecutor the acquittal should be recorded without taking the opinion of the assessors An acquittal is a matter of right to the accused whatever might be the opinion of the assessors—Ratanlal 307

When a charge is withdrawn and the accused is acquitted, it is not competent to the revisional Court to consider the question of the legality of the charge A number of persons were charged before the Magistrate with the offence of robbery The Public Prosecutor withdrew from the charge and the Magistrate recorded an order

of acquittal. On revision, it was contended that the charge of robbery was wrong in as much as more than five persons were implicated in the net and the Magistrate ought to have framed a charge of dacoity and therefore the acquittal on the charge of robbery was wrong. The High Court refused to enter into the question as to the legality of the charge and held that the Magistrate's procedure was right. There being a charge before him and that charge having been withdrawn he acted rightly in recording an order of acquittal—2 A L J 31.

Retrial—An order of acquittal under this section bars a retrial for the same offence by virtue of sec. 403—9 A L R 26, 40 MAD 976 18 Cr L J 129 (MAD) 21 Cr L J 245 (siml).

Accused a competent witness against co-accused—When a prosecution against a person has been withdrawn under this section he can be examined as a witness in the case against his other co-accused—25 BOM 122 31 CAL 144 17 CAL 151.

But the prosecution must be withdrawn and the accused discharged under this section before he can be examined as a witness against his co-accused because so long as he is in the position of an accused no oath can be administered to him under section 312 (1) and he cannot therefore be examined as a witness. Where the Court sanctions the withdrawal of prosecution but omits to record an order of discharge and the accused continues to be kept in custody his position is in no way changed from that of the accused and he cannot be examined as a witness—31 CAL 133. But if the accused was in fact discharged from custody by virtue of withdrawal from prosecution the omission to record a formal order of discharge would be cured by sec. 317 and the accused would be a competent witness against the other accused—7 A L J 86 18 C W N 1213.

REVISION—In 1914 M W N 776 it was doubted whether the High Court had power to interfere in revision with the discretion of a Magistrate in giving consent to the withdrawal of a prosecution. But in 48 CAL 1105 26 C W N 880 and 1 P L 7 108, it is laid down that the High Court is in a position to consider whether the discretion vested in the Magistrate to give consent to the withdrawal of a prosecution has been rightly exercised.

Where good reasons have been shown by the Court below for allowing the withdrawal of prosecution the High Court will be slow to interfere in revision against the order allowing the withdrawal—24 Cr L J 5 (CAL)

was keeping out of the way and could not be served with summons. He should take steps to enforce his attendance—2 Weir 605

The complainant has no *locus standi* in the matter of withdrawal of prosecution. When a case has been started upon a police report and the Court Sub Inspector (who is the Public Prosecutor) wants to withdraw the case the Court cannot reject the application for withdrawal simply because the complainant wants to proceed with the case—1 P L T 400

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Where a person is acquitted on the charge being withdrawn by the Public Prosecutor the acquittal should be recorded without taking the opinion of the assessors. An acquittal is a matter of right to the accused whatever might be the opinion of the assessors.—Ratanlal 307

When a charge is withdrawn and the accused is acquitted it is not competent to the revisional Court to consider the question of the legality of the charge. A number of persons were charged before the Magistrate with the offence of robbery. The Public Prosecutor withdrew from the charge and the Magistrate recorded an order

of acquittal. On revision, it was contended that the charge of robbery was wrong in as much as more than five persons were implicated in the act, and the Magistrate ought to have framed a charge of dacoity and therefore the acquittal on the charge of robbery was wrong. The High Court refused to enter into the question as to the legality of the charge and held that the Magistrate's procedure was right. There being a charge before him and that charge having been withdrawn he acted rightly in recording an order of acquittal—2 A L J 20.

Retrial—An order of acquittal under this section bars a retrial for the same offence by virtue of sec. 403—9 A L R 26, 10 MAD 976. 18 Cr L J 129 (MAD). 21 Cr L J 245 (amb).

Accused a competent witness against co-accused—When a prosecution against a person has been withdrawn under this section he can be examined as a witness in the case against his other co-accused—25 HCR 122. 13 CAL 1331. 17 CAL 134.

But the prosecution must be withdrawn and the accused discharged under this section before he can be examined as a witness against his co-accused because so long as he is in the position of an accused no oath can be administered to him under section 312 (1) and he cannot therefore be examined as a witness. Where the Court sanctions the withdrawal of prosecution but quits to record an order of discharge and the accused continues to be kept in custody his position is in no way changed from that of the accused and he cannot be examined as a witness—13 CAL 1331. But if the accused was in fact discharged from custody by virtue of withdrawal from prosecution the omission to record a formal order of discharge would be cured by sec. 337 and the accused would be a competent witness against the other accused—7 A L J 86. 18 C W N 1213.

REVISION—In 1914 M W N 776 it was doubted whether the High Court had power to interfere in revision with the discretion of a Magistrate in giving consent to the withdrawal of a prosecution. But in 48 CAL 1105. 26 C W N 880 and 1 P L T 406, it is laid down that the High Court is in a position to consider whether the discretion vested in the Magistrate to give consent to the withdrawal of a prosecution has been rightly exercised.

Where good reasons have been shown by the Court below for allowing the withdrawal of a prosecution the High Court will be slow to interfere in revision against the order allowing the withdrawal—24 Cr L J 5 (CAL).

An order of *acquittal* passed under this section cannot be inter-
fered with by the High Court in revision—5 M. L. T. 216.

Further inquiry—Where the order of discharge under this
Section is a proper one no further inquiry should be directed under
sec. 436—(1911) 2 M. W. N. 74 But a fresh complaint can be made
on fresh materials

495. (1) Any Magistrate inquiring into or trying any
Permission to con- case may permit the prosecution to be
duct prosecution. conducted by any person other than an
officer of police below a rank to be prescribed by the Local
Government in this behalf * * * but no person, other
than the Advocate General, Standing Counsel, Government
Solicitor, Public Prosecutor or other officer generally or
specially empowered by the Local Government in this behalf
shall be entitled to do so without such permission.

(2) Any such officer shall have the like power of with-
drawing from the prosecution as is provided by S. 494, and
the provisions of that section shall apply to any withdrawal
by such officer.

(3) Any person conducting the prosecution may do so
personally or by a pleader.

(4) An officer of police shall not be permitted to con-
duct the prosecution if he has taken any part in the investi-
gation into the offence with respect to which the accused is
being prosecuted.

The words "with the previous sanction of the Governor-General
in Council" have been omitted by the Devolution Act (XXXVIII
of 1920)

'MAY PERMIT'—The permission of the Magistrate is dis-
cretionary, and the High Court will not interfere with such discre-
tion Where a Magistrate has, after due consideration, exercised
the discretion and allowed counsel to appear on behalf of the prose-
cution, the High Court cannot as a Court of Revision over-rule the
order of the Magistrate and direct him to refuse to allow counsel
to appear—2 Weir 655 Similarly, where the District Magistrate
considers that the too frequent appearance of pleaders for the
prosecution in petty criminal cases is detrimental to the interests of
justice, he can refuse to permit the prosecution to be conducted by
the pleader, and the Chief Court will decline to interfere with the
order of the District Magistrate—1905 P. R. 6

ANY PERSON —The Magistrate is not precluded from exercising in exceptional cases his discretion by allowing private Vakils of good character to conduct the prosecution—12 M L J 351

The words 'any person' include persons other than certificated pleaders. It is however discretionary with the Criminal Courts in each case to permit such persons to conduct the prosecution—*M H C PROC* 2-0 1882

The fact that a certain person is also a Prosecuting Inspector does not deprive him of his right as a private citizen and he may in his private capacity ask for permission to prosecute in his case—10 BUR L T 213. So also the fact that a particular person is a complainant is not a sufficient ground for not permitting him to prosecute the case—*Ibid*. But it is doubtful whether the words 'any person' would include an absolute stranger who had no connection in the remotest degree with the prosecution and whose desire to help the prosecution was based on a personal grudge only—11 A L J 313.

If the offence be of a nature affecting the public (e.g. rioting or unlawful assembly) which the Crown alone in the interests of public peace and security has a right to conduct a private person should not be permitted to conduct the prosecution—18 Cr L J 329 (MAD)

SUBSECTION (2) —'Any such officer' —These words refer only to the Advocate General Standing Counsel etc mentioned in sub-section (1). If any person other than these officers (e.g. an Advocate privately engaged by the complainant and permitted by the Magistrate) withdraws from the prosecution the effect provided in sec. 494 does not follow. In other words the trial will proceed—1908 L B R 1st Qr (Cr P C) 15 see also 1911 M W N 106.

SUBSECTION (3) —A person whether a private complainant or not when he is permitted to conduct the case as prosecutor, may instruct a counsel to appear—11 B H C R 102.

SUBSECTION (4) —*Exclusion of Police Officer* —In all important cases and especially in cases of murder and dacoity, the police officer making the investigation should be examined as a witness regarding the circumstances of the investigation. For this reason, he is excluded from conducting the prosecution—*Ratanlal* 173. Where the police officer who conducted the investigation by arresting the accused and seizing the property found was allowed to conduct the prosecution, it was held that such a procedure was highly improper, but since in this case the accused were not prejudiced there-

by the irregularity did not vitiate the trial but was cured by sec 537—26 BOM 533

CHAPTER XXXIX

OF BAIL

496. When any person other than a person accused of

In what cases bail to a non-bailable offence is arrested or
be taken

detained without warrant by an officer in charge of a police-station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail. Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided

Provided, further, that nothing in this section shall be deemed to affect the provisions of S 107, sub-S (4), or S 117, sub-S (3)

CHANGE —The second proviso has been added by the Cr P C Amendment Act 1923. For notes relating to this proviso see under sec 107 (4) at p 112 *ante*

'Shall be released on bail' —This section is imperative in its terms and the Court is bound to comply with its provisions. In every bailable offence bail is a right and not a favour. Detention in the lock up is the alternative not the original order—32 CAL 80, 6 C P L R 11. It is only when the accused fails to furnish bail that he can be detained in custody—6 N W P H C R 366. A Magistrate is not competent to refuse bail unless the law sanctions such refusal—1 C L R 130. The Magistrate cannot refuse to pass an order of bail on the ground of expediency and the inability of the accused's pleader to show a provision in the Code how he could claim a bail—6 C P L R 11.

When the Police arrests a person under sec 55 he should be given the option of bail—11 ALL 15.

Where a person arrested under sec 114 claims a bail he is entitled to bail as a matter of right—6 C P L R 11. See also 32 CAL 80 and 36 MAD 471 cited under sec 107 at p 112.

Refusal of bail —If the Magistrate refuses to grant bail he must record his reasons for such refusal. In the absence of any record

of reasons the High Court in *révision* granted bail—11 C. W. N. cxxxviii. If the Magistrate improperly refuses bail no action is sustainable against him for such improper refusal. The duty of a Magistrate in accepting or refusing bail is not merely a ministerial but a judicial duty. A mistake in the exercise of that duty, without malice, will not sustain an action—2 M. H. C. R. 396.

Court to decide sufficiency of bail —When the bail is ordered by the Court the duty of deciding as to the sufficiency or otherwise of the bail is with the Court itself and not with the police. If such duties are irregularly entrusted to police two dangers are likely to arise — first a police officer may sometimes be unscrupulous enough to take advantage of the power entrusted to him for the purpose of extortion and secondly the bringing of false charges against the police. But the Court when it admits a man to bail is at liberty to call for a report from the police as to the sufficiency of the bail—15 CAL. 455.

BOND —*Difference between bail and recognizance* —Bail means security with sureties whereas the bond referred to in the first proviso is a simple reimbursement of the principal without any surety.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial as the case may be that there are not reasonable grounds for believing that the accused has committed a *non-bailable* offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall pending such inquiry, be released on bail, or at the discretion of such officer or Court on the execution by him of a bond without sureties for his appearance as hereinafter provided

(3) *An officer or a Court releasing any person on bail under sub-section (1) or sub-section (2) shall record in writing his or its reasons for so doing*

(4) *If at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence it shall release the accused if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered*

(5) *A High Court or Court of Session and in the case of a person released by itself, any other Court may cause any person who has been released under this section to be arrested and may commit him to custody*

CHANGE —In sub-section (1) the words 'an offence punishable with death or transportation for life' have been substituted for the words 'the offence of which he is accused' the proviso and sub-sections (3) and (4) have been newly inserted and the italicised words in sub-section (5) have been added. "It was pressed upon us that the provisions as to bail in non-bailable cases are much too stringent. One suggestion made to us was that in section 197 we should delete all words after 'may be released on bail' in sub-section (1) and the whole of sub-section (2). The result would have been to give all Courts full discretion in the matter of allowing bail in non-bailable cases and we felt generally that this was going too far. What we have done is to allow the Court or police officer to release on bail in a non-bailable case unless there appear to be reasonable grounds for believing that the accused has been guilty of an offence punishable with death or transportation and as some safeguard against this we have provided in sub-section (5) for a review

by the Sessions Court or the High Court of any order admitting to bail in a non-bailable case —*Report of the Joint Committee (1922)*

PRINCIPLE —Under the old section the general rule was that bail was not to be taken in respect of non-bailable offences—8 BOM L R 420, 36 CAL 166, 10 S L R 208, 2 Weir 657 Under the present section, the Legislature by defining the offences under which bail is not to be granted (viz offences punishable with death or transportation) has practically laid down that bail should ordinarily be granted and that only in respect of heinous offences it will be refused See also 36 CAL 174 and 10 C W N 1093 where it has been held that the accused may be ordinarily released on substantial bail unless reasonable grounds are made out for believing the accused to be guilty

But, it is submitted the present amendment is far from being satisfactory It would have been better if the Legislature had deleted all the words in the section restricting discretion in the grant of bail, and had allowed a Magistrate free and unfettered discretion to allow or not to allow bail in non bailable cases Under the present law a rich banker with a large family and property, if accused of embezzlement of a few hundred rupees for which he may be sentenced to transportation cannot be released on bail even if the Magistrate is sure that he will not abscond This would be denying an accused the right to prepare his defence to establish his innocence Moreover the law as it stands at present is disastrous in practice in as much it will cause a Magistrate to prejudice that the accused is guilty of a grave offence punishable with transportation or death and therefore not to allow the accused bail It should be noted that several members of the Legislative Assembly pressed these points during the Debate on the Bill but their motion was lost See the *Debate in the Legislative Assembly* 12th February, 1923

Reasonable grounds for believing, etc. —The section says nothing about taking into consideration the likelihood or unlikelihood of the accused person absconding All that the Court has to consider is whether there are reasonable grounds for believing that the accused is guilty—6 L B R 172 Other considerations may arise in deciding the question as to granting bail and one of those considerations is whether there are any grounds for supposing that the accused would abscond But the main question for consideration in determining

matters of bail is whether there are reasonable grounds for believing the accused to be guilty—36 CAL 174 .

Whether there are reasonable grounds or not for believing that the accused are guilty must be decided judicially, that is to say, there must be tangible evidence on which if unrebutted the Court might come to the conclusion that the accused might be convicted—36 CAL 174

PROVISO —" This clause provides for the grant of bail in any case at the discretion of the Court if the accused is a minor female, sick or infirm person —*Statement of Objects and Reasons* (1914)

SUB SECTION (2)—BOND FOR APPEARANCE —When a Police officer takes a bond under this section he has power to make it a condition of the bond that the accused person shall appear *before the police*, the law does not require that the accused person shall always be directed to appear before a *Court* When the law enables a Police officer to take bonds that officer can certainly direct the accused to appear before the Police To hold otherwise would be to render secs 499 and 514 meaningless—1913 P R 13 But in 11 CAL 77 it has been held that a bond for appearance before a Police officer is void

SUB SECTION (4) —This subsection did not occur in any of the Bills but has been added during the course of the Debate in the Legislative Assembly

SUB SECTION (5)—*Cancellation of bail* —The Magistrate can cancel any bail allowed to an accused person, and direct him to surrender if it appears on the production of further evidence that a case is made out against him—10 C W N 1091 36 CAL 174

The High Court and Court of Session can cancel a bail granted by the Subordinate Court

REVISION —The proceedings in which it is or has to be determined whether bail from an accused person should be taken or not falls within the definition of 'judicial proceedings' and the High Court has power to interfere with the orders made in such proceedings when they prove to be illegal—6 MAD 63 The District Magistrate cannot revise any order as to bail passed by a subordinate Magistrate under this section If the District Magistrate considers the subordinate Magistrate's order to be wrong he should report it to the High Court—22 BOM 519 The District Magistrate has a right to order the arrest of a person released on bail by a subor

minate Magistrate—4 BUR L F 70 Sub-section (5) now gives the power to the High Court and the Court of Session

Even the High Court's power of interference is limited. The High Court has jurisdiction to interfere in revision, only if the Judge has passed an illegal order. Where a Sessions Judge after considering the evidence thinks that there are no reasonable grounds for believing the accused to be guilty of the offence of which he is accused, and releases him on bail, the High Court will not go behind this finding and cancel the order of the Judge releasing the accused on bail—10 M L J 411 5 A L J 119. The High Court will be very cautious in interfering with the discretion of a Magistrate in case of bail under sec. 497 especially where the prosecution has not tendered evidence to connect the accused with the offence—Ratanlal 892

498. The amount of every bond executed under this

Chapter shall be fixed with due regard to the circumstances of the case, and shall not be excessive, and the High

Court or Court of Session may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or, that the bail required by a police officer or Magistrate be reduced

AMOUNT OF BOND—The amount of bond should be fixed with reference to the social status of the party concerned—2 L B R 245

POWER OF HIGH COURT—The High Court and the Court of Session have unlimited judicial discretion in granting bail under this section—7 BUR L R 86. This section gives the High Court and the Court of Session very wide powers to admit an accused person to bail in any case even when he is charged with a non bailable offence—5 A L J 119 2 A W N 244 2 Weir 657

But though the power of the High Court under this section to grant bail in any case is quite unfettered still in exercising its discretion the High Court ought to take into consideration the limitations imposed by Sec. 497—37 CAL 412. (But now the limitations imposed by Sec. 497 are very few.) The rule laid down in sec. 497 for the guidance of Courts other than High Courts is a rule founded upon justice and equity and one which should be followed by the High Court as well as by every other Court unless anything appears to the contrary. The extended powers given to the High Court under

Sec 498 are not to be used to get rid of this very reasonable and proper provision of the law—42 C.A. 25. No doubt the High Court has absolute discretion in the matter of granting bail and is not bound by the provisions of sec 197 but the Legislature having placed the initial stage of dealing with crimes with Magistrates and having in fact enacted that persons accused of non-bailable offences shall not be released on bail except under the terms of sec 497, the High Court is bound to follow the general law as a rule and not to depart from it except under very special circumstances—6 L. B. R. 152, 10 S. L. R. 208.

When High Court can grant bail—The High Court and Court of Session can exercise their power of granting bail as soon as the Police have arrested the accused and even before the case is sent up to the Magistrate—7 B. & L. R. 86. They can admit a person to bail even where he has been convicted and has not appealed—5 A. L. J. 419. Where the accused has obtained special leave to appeal to Privy Council against the conviction of the High Court the latter has jurisdiction to make an order releasing the accused on bail, pending the decision of the Privy Council—24 M.A.D. 161. *Contra*—1908 P. R. 15.

When High Court will not grant bail—Where the accused relies merely on a technical ground against the probability of his conviction he should not be admitted to bail—Ritualal 480. The High Court refused to grant bail where the application for bail contained defamatory statements and allegations consisting of attacks on the trying Magistrate and on the public and private conduct of other officers of high rank in the service of the Government—15 B.O.M. 189.

POWER OF SESSIONS JUDGE—The Sessions Judge can grant bail to any person who has been wrongly convicted by the Magistrate and whose case he can either deal with himself or can refer to the High Court. But the words any person do not include a person convicted by the Sessions Judge himself. Where a Sessions Judge after convicting the accused released them on bail pending their appeal to the High Court it was held that he had no jurisdiction to do so. This section does not give him power to alter or vary his own order—4 B.O.M. 1 R. 75.

499. (1) Before any person is released on bail or released

bound of accused and on his own bond, a bond for such sum of money as the police-officer or Court, as the case may be thinks sufficient shall be executed by

such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police-officer or Court, as the case may be.

(2) If the case so require, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge.

TIME AND PLACE —A bail bond must contain the time and place of appearance—5 A W N 44

Appearance every day —There is nothing illegal in requiring the accused to bind himself to appear from the date of the execution of the bail bond on every day until the case is disposed of. No notice is necessary before proceeding to enforce the penalty if default is made—6 M H C R APP 3

Verbal direction to appear —By the terms of bail bond the defendant bound himself to appear 'on the first inquiry or at other times required. He appeared on the first day of the inquiry and was verbally directed to appear on a subsequent date but failed to do so. It was held that the amount secured by the bond could be legally forfeited by reason of such non-attendance—2 Weir 638

Omission of date by surety —Where in the bail bond the accused bound himself to appear on a specified date and below his signature was the undertaking by the surety that he shall cause the accused's appearance but this declaration did not mention the date for the accused's appearance. The accused having made default the security was forfeited. It was held that the bail-bond and the undertaking by the surety should be read as one document and the undertaking should be read as referring to the date mentioned in the portion of the bond signed by the accused and that therefore the security was rightly forfeited—19 Cr L J 687 (MAD)

Appearance before Police —The words 'until otherwise directed by the Police Officer' shew that a bond under sec 497 may require the accused to appear before the Police the direction as to appearance is not limited to appearance before a Court—1913 P R 22.

500. (1) As soon as the bond has been executed, the person for whose appearance it has been executed shall be released; and, when he is in jail, the Court admitting him to bail shall

Discharge from custody

issue an order of release to the officer in charge of the jail, and such officer on receipt of the order shall release him.

(2) Nothing in this section, S 496 or S 497 shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the bond was executed.

501. If, through mistake, fraud or otherwise, insuffi-

Power to order sufficient sureties have been accepted, or if they afterwards become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be brought before it and may order him to find sufficient sureties, and, on his failing so to do, may commit him to jail.

Scope—This section applies only to a case where there were sureties, it does not apply where the accused was let out on his own bond, without any surety—38 MAD 1028

Insufficient sureties—A Magistrate is justified in increasing the amount of bail if he further inquires the case turns out more serious than he at first imagined—1912 P W R 1

502. (1) All or any sureties for the attendance and appearance of a person released on bail may at any time apply to a Magistrate to discharge the bond, either wholly or so far as relates to the applicants.

(2) On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him.

(3) On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as relates to the applicants and shall call upon such person to find other sufficient sureties, and, if he fails to do so, may commit him to custody.

Where a surety has applied for cancellation of the bail bond and the Magistrate has received the application there is no other alternative left to the Magistrate than to cancel the bail bond. He is not bound to hear the application on the merits and the Magistrate cannot dismiss it because of the applicant's failure to attend and plead—9 BOM L R 1257

CHAPTER XL

OF COMMISSIONS FOR THE EXAMINATION OF WITNESSES

503. (1) Whenever, in the course of an inquiry, a trial When attendance of or any other proceeding under this witness may be dispensed with. Code, it appears to a Presidency Magistrate, a District Magistrate, a Court of Session or the High Court that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense and inconvenience which, under the circumstances of the case, would be unreasonable, such Magistrate or Court may dispense with such attendance and may issue a commission to any District Magistrate or Magistrate of the first class, within the local limits of whose jurisdiction such witness resides, to take the evidence of such witness

(2) When the witness resides in the territories of any Prince or Chief in India in which there is an officer representing the British Indian Government, the commission may be issued to such officer

(3) The Magistrate or officer to whom the commission is issued, or, if he is the District Magistrate, he or such Magistrate of the first class as he appoints in this behalf, shall proceed to the place where the witness is or shall summon the witness before him, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in trials of warrant cases under this Code

(4) Where the commission is issued to such officer as is mentioned in sub-section (2), he may delegate his powers and duties under this commission to any officer subordinate to him whose powers are not less than those of a Magistrate of the first class in British India

SCOPE OF SECTION—This section provides for the issue of a commission to examine a witness in British India or in the territories of any Prince or Chief in India in which there is an officer representing the British Government. This section does not provide for the examination of a witness residing outside India—5 BOM 335, 10 Cr L J 521 (All.)

This section relates to the issue of a commission and does not empower the trying Magistrate himself to go to the house of a witness to examine him—2 S L R 8

In the course of inquiry —A committing Magistrate is competent to examine a witness in the course of the inquiry before himself. But after making the order of committal, he has no jurisdiction to issue a commission for taking evidence so that it might be available at the trial before the Court of Session or High Court. After commitment is made, applications for the examination of witnesses on commission must be made to the High Court or to the particular Judge exercising original criminal jurisdiction in the High Court or to the Court of Session, as the case may be—19 CAL 113, 19 BOM 749

'Witness' —This section relates to commission for the examination of witnesses. In the preliminary stage of a proceeding a complainant is not a witness, and a commission cannot be issued for his examination. But if a complainant calls himself to testify to matters within his knowledge he will as regards such testimony be a witness for the prosecution and the issue of a commission for his examination is perfectly legal—1896 P R 10, 1913 P W R 11, 42 CAL 19

Witness residing within jurisdiction —There is nothing in the language of this section to support the contention that the Court has no authority to examine a witness on commission when he is within the jurisdiction—6 BOM 285, 24 CAL 551. This section does not say that a witness residing within the jurisdiction of a Court cannot be examined on commission but must be compelled to appear before the Court. The express words in this section are 'within the local limits of whose jurisdiction such witness resides'

Expert witnesses —Where an expert in handwriting appears to be the principal witness in the case he ought not to be examined on commission but should appear before the Court—(1911) 2 M W A 97

Pardanashin ladies —A *pardanashin* lady has a right as a witness in a criminal case to be exempt from personal appearance at Court and to be examined on commission—4 CAL 20. This section allows the examination on commission of a witness who is a *glad* woman although she is practically the complainant—2 WIR 67. Although *pardanashin* women are not of right exempted from personal appearance at Court the word 'inconvenience' in this section empowers the Courts to allow examination by commission where a witness according to the customs and manners of the country ought

not to be compelled to appear in public—5 ALL 92, See also 1 S. I. R. 5. An application by a *pardanashin* woman to be examined on commission on the ground that her appearance in Court would cause a degradation to her, was granted where she lived near the Court house and volunteered to pay the expenses of the commission and the opposite party did not insist on her examination in open Court—15 CAL. 775, 24 CAL. 551. Even a daughter of a prostitute is entitled to be examined on commission if she is *pardanashin* and living a married life, despite her lowly origin—1913 P. W. R. 11.

Contra —12 ALL. 69 where it is held that it would be weakness to surrender as a general principle to be adopted that *pardanashin* ladies whose evidence is required in criminal trials are in all cases to be allowed to compel the Court to examine them on commission at some other place than the Court house itself. If it becomes imperatively necessary to take her evidence the Magistrate should make arrangements so as to take her evidence either in an empty Court room in the presence of himself the accused and his pleader for the prosecution if there be any or if no empty room is available in his own private room or some other room in the Court building. In 5 ALL. 92 it has been held that where the *pardanashin* woman was not merely a witness but was also the complainant in a case of defamation (which gave both a civil and a criminal remedy) the fact that she avoided the civil remedy and chose to set the criminal law in motion materially altered her position as regards the question whether she should be exempted from personal appearance and the accused had a right and a privilege to have her evidence taken in his presence in the Court.

DELAY EXPENSE, OR INCONVENIENCE. —The taking of evidence on commission in criminal cases ought to be most sparingly resorted to. Such a procedure may be adopted only in extreme cases of delay expense or inconvenience—5 ALL. 92. Where the evidence of two witnesses was a most material one in the case in as much as they deposed to the identification of the stolen property on which deposition the whole case depended the witnesses ought not to have been examined on commission but their attendance before Court ought to have been procured and the expense of Rs. 500 in procuring their attendance was not considered to be unreasonable or excessive having regard to the circumstances of the case—6 ALL. 224.

'May issue' —*Discretion of Court* —The issue of a commission for examination is entirely in the discretion of the Court—8 CAL. 806.

also be received in evidence at any subsequent stage of the case before another Court.

SUB-SECTION (2) —Admissibility of evidence taken on commission —This section has been enacted on the basis of the judgment in 13 BOM 749. Under the 1882 Code, evidence taken under a commission issued by the Chief Presidency Magistrate during the course of an inquiry before him was held inadmissible at the trial of the same case at the High Court Sessions—19 CAL 113. This difficulty has been removed by this sub-section.

Evidence taken on commission is admissible in a trial of a seaman for an offence committed on the High Seas—16 CAL 238.

508. In every case in which a commission is issued, Adjournment of in under S 503 or S 506, the inquiry, quiry or trial trial or other proceeding may be adjourned for a specified time reasonably sufficient for the execution and return of the commission.

When a commission has been issued, the trial should be postponed till the return of the commission. The trial and commission cannot go together.

The discretion given by this section to adjourn proceedings ought to be exercised in a reasonable manner. The accused person should not be detained for an unnecessarily long time—See 19 CAL 113.

CHAPTER XLI

SPECIAL RULES OF EVIDENCE

509. (1) The deposition of a Civil Surgeon or other Deposition of medical medical witness taken and attested by witness a Magistrate in the presence of the accused, or taken on commission under Chapter XL, may be given in evidence in any inquiry, trial or other proceeding under this Code, although the deponent is not called as a witness.

Power to summon (2) The Court may, if it thinks medical witness fit summon and examine such deponent as to the subject-matter of his deposition.

DEPOSITION —It is a deposition of a Civil Surgeon that can be taken in evidence. It is an opinion of the Civil Surgeon which can be considered in judgment with the usual tests expressed in when examined by a surgeon addressed to which only.

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509. (1) The deposition of a Civil Surgeon or other Deposition of medical medical witness taken and attested by witness a Magistrate in the presence of the accused, or taken on commission under Chapter XL, may be given in evidence in any inquiry, trial or other proceeding under this Code, although the deponent is not called as a witness

Power to summon medical witness (2) The Court may, if it thinks fit summon and examine such deponent as to the subject-matter of his deposition

DEPOSITION —It is only the deposition of a Civil Surgeon that can be taken in evidence the only opinion of the Civil Surgeon which can be considered in judicially dealing with the case is an opinion expressed by him when examined as a witness under the usual tests to which witnesses are subjected The Civil Surgeon's letter addressed

to the Sessions Judge expressing an opinion as to the nature of the wound inflicted upon the deceased, is an extra judicial matter and cannot be received in evidence—8 CAL 211 So also the certificate of a medical officer as to the cause of the death of a person and of the fatal character of the wounds is no evidence—2 Weir 659 The report of a Medical man on his *post mortem* examination cannot be treated as evidence, though it may be used to refresh his memory when giving evidence—9 CAL 455 A paper which purports to be the substance of a report from a subordinate medical officer with an expression of concurrence by the Civil Surgeon cannot be used as evidence although the examination of a medical witness written in proper form may be so used—11 W R 2 A certificate granted by the Professor of a Medical College as regards the bones submitted to him for examination is not admissible in evidence He must be examined as a witness—24 BOM I R 803

'TAKEN AND ATTESTED' —Before the deposition of a medical witness given before the committing Magistrate can be admitted in the Sessions Court it must either appear in the Magistrate's record or must be proved by the evidence of witnesses to have been taken and attested in the prisoner's presence It should not be merely presumed under sec 114 Illustration (e) of the Evidence Act to have been so taken and attested—9 ALL 720

'By a Magistrate' —The deposition may be attested by a Magistrate *i.e.*, any Magistrate not necessarily by the committing Magistrate while holding the preliminary inquiry—13 A W N 180

'In the presence of the accused' —To render it admissible in evidence the deposition of witnesses in criminal cases should be taken and attested by the Magistrate in the presence of the accused—18 CAL 129 8 CAL 739 The evidence of a Medical officer given before a committing Magistrate is not admissible in the Sessions Court where the committing Magistrate does not certify that the evidence was given in the presence of the accused—1 C W N 49 In the absence of proof that the deposition was taken and attested by the Magistrate in the presence of the accused it cannot be presumed under sec 80 or sec 114 III (e) of the Evidence Act, that the deposition was so taken and attested—18 CAL 129, 10 ALL 174 The examination of a medical witness taken in the absence of the accused is inadmissible in evidence When, however, there is sufficient *prima facie* evidence to warrant a commitment to the Sessions Court and the evidence of the medical witness is likely to be only

chemical analysis report or the evidence of the medical officer until the connecting links requisite to render them admissible have been established—1 BUR S R 634 A Sessions Judge is bound to warn the jury that before using the chemical examiner's report, they must be satisfied on the evidence that the substances examined were in fact what they were said to be—18 C W N 180

511. In any inquiry, trial or other proceeding under this Code, a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force—

- (a) by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was had to be a copy of the sentence or order, or,
- (b) in case of a conviction, either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered, together with, in each of such cases evidence as to the identity of the accused person with the person so convicted or acquitted

PROOF OF PREVIOUS CONVICTIONS—Before passing sentences, it is desirable and necessary that if there are previous convictions they should properly be proved—17 Cr I J 179 Magistrates are not absolved from the ordinary rules of evidence in taking proof of previous convictions Whenever it is required to prove a previous conviction against a man, whether it be for the purposes of enhancement of punishment under section 77 I P C or in proceedings under Chap VIII of the Cr P C such previous conviction must be proved strictly and in accordance with law Unless they are so proved no court can properly take such previous conviction into consideration—43 CAL 1128

Previous convictions should regard being had to the provisions of this section be proved by copies of judgment or extracts from judgments or by any other documentary evidence of the fact of such previous convictions, and the examination of the accused in respect of those convictions is having regard to sec 312 without legal warrant or jurisdiction—24 CAL 680 24 BOW 129

When the previous conviction has been put to the accused and he denies it, the certified extract from the records of the Court in which he was convicted should be put in evidence, proof should be given that he and the person named therein are one and the same person and the Court should record a specified finding upon that point—1 A W N 144, 15 W R 53 But a mere *Kaufiat* from the record office is not sufficient to prove a previous conviction—15 W R 53

Finger impression —The manner in which a previous conviction may be proved is not limited to the method laid down by this section. Any relevant evidence upon which the Court can properly base a finding that the accused before it was on a previous occasion convicted of an offence will do as well as the methods indicated by this section. Thus, a previous conviction may be proved by *finger-impression*. See 3 N L R 1, 6 C P L R 1, 32 CAL 759 1 C W N 33, 1906 P L R 3 If the identity of the accused is to be proved by a comparison of finger prints the one taken in Court being compared with certain finger prints contained in a record of previous convictions, there ought to be evidence to prove (1) similarity between the two, and (2) identification of the last mentioned finger-prints as those of the person who has been previously convicted—21 C W N 469 The papillary ridges on the bulbs of the fingers and thumbs, by means of which finger impressions are made, while proved to be almost beyond change from birth to death, are never wholly repeated in the case of the fingers of any other person and they therefore furnish a surer test of identity than any other comparable bodily feature. Where two prints made on different occasions resemble one another in the minutest and contain no points of disagreement an irresistible conclusion arises that they were made by the same finger—3 N L R 1

512. (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an

amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable

(2) If it appears that an offence punishable with death or transportation has been committed when offender unknown by some person or persons unknown, the High Court may direct that any Magistrate of the first class shall hold an enquiry and examine any witnesses who can give evidence concerning the offence. Any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of British India

Scope of section—This section has been specially enacted for enabling the Magistrate to record evidence in the absence of an absconding accused and therefore a Magistrate cannot reject an application of the complainant to summon witnesses or to call on them to produce documents because the accused has absconded—2 BOM L R 707

A pardon can be tendered to a co-accused under sec 337 even though the principal accused has absconded in such a case the approver's evidence will be recorded under this section—46 BOM 120

Proof of absconding—In order to give the Court jurisdiction to examine witnesses in the absence of the accused it must be proved to the satisfaction of the Court that the accused has absconded and that there is no immediate prospect of arresting him—10 A W N 100, 16 A W N 182, 21 W R 12 where the accused has absconded the section requires that the absconding should be alleged, tried and established before the deposition of witnesses is recorded—10 CAL 107. Where there was no proof or finding that the accused had absconded and the Magistrate recorded deposition of witnesses in the absence of the accused the procedure was illegal—10 A W N 100, 1883 P R 21 and the evidence so recorded was inadmissible against the accused when he was afterwards arrested—38 ALL 29. Where evidence was recorded by the Magistrate while there was no proof or finding that the accused had absconded there was no judicial proceeding and any witness giving false evidence therein could not be prosecuted for an offence under Sec 193 I P C—10 A W N 100. But where the Magistrate clearly found that the accused had absconded the mere fact that he did not return in his order on finding that there was no immediate prospect of arrest of the accused would not

render the evidence taken by him in the absence of the accused inadmissible against them when arrested—41 ALL 60

Value of deposition given in absence of accused —The latter part of subsection (1) seems clearly to indicate that witnesses who were examined during the absence of the absconding accused should be examined in the presence of the accused, when he is found, unless it is impracticable to obtain their attendance. Where it was not impracticable to obtain the attendance of the witnesses when the accused was found, and the accused was committed to the Sessions merely on the strength of the recorded deposition of those witnesses, the commitment was held to be illegal—22 W. R. 33, See also 1911 P. L. R. 157. But if the accused pleads to the charge the commitment cannot be quashed—12 C. L. R. 120. If, however, upon such commitment, the Sessions Judge in the course of the trial is of opinion that the prosecution has not had a basis for the reception of the deposition taken before the Magistrate in the absence of the accused, he should adjourn the trial and under Sec. 430 summon such witnesses as he may deem material—12 C. L. R. 120.

CHAPTER XLII.

PROVISIONS AS TO BONDS.

513. When any person is required by any Court or Deposit instead of officer to execute a bond, with or without recognizance, without sureties, such Court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix, in lieu of executing such bond.

'Except in case of bond for good behaviour' —The object of law in making this exception in good behaviour cases is to secure the good conduct of the person bound over not by means of money but by a bond and sureties, and by making the sureties responsible for the good behaviour of the person bound down. See 2 N. W. P. H. C. R. 295.

In lieu of executing, and bond —The deposit of money is in lieu of executing a bond. Where a person was ordered to execute a bond for good behaviour and also to deposit a certain sum in addition thereof, the order as to deposit was illegal because it was not in lieu of, but in addition to execution of bond, and also because it was a good behaviour case—Ratanlal 671.

514. (1) Whenever it is proved to the satisfaction of Procedure on for- the Court by which a bond under this forfeiture of bond

Code has been taken, or of the Court of a Presidency Magistrate or Magistrate of the first class, or when the bond is for appearance before a Court, to the satisfaction of such Court,

that such bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same by issuing a warrant for the attachment and sale of the moveable property belonging to such person or his estate if he be dead

(3) Such warrant may be executed within the local limits of the jurisdiction of the Court which issued it and it shall authorize the *attachment* and sale of any moveable property belonging to such person without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such

(4) If such penalty is not paid and cannot be recovered property is found by such attachment and sale, the person so bound shall be liable, by order of the Court which issued the warrant, to imprisonment in the civil jail for a term which may extend to six months

(5) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only

(6) Where a surety to a bond dies before the bond is forfeited his estate shall be discharged from all liability in respect of the bond * * *

(7) If *any person who has furnished security under section 106 or section 118 or section 562 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond or of a bond executed in lieu of his bond under section 511-B, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and, if such certified copy is so used, the*

Court shall presume that such offence was committed by him unless the contrary is proved.

CHANGE —In sub-section (3) the word 'attachment' has been substituted for the word 'distress' as the former word is more appropriate. In sub-section (6) the words "but the party who gave the bond may be required to find a new surety" have been omitted, but separate provision is made in the new section 514-A. Sub-section (7) has been newly added, the reason is stated below.

PROOF OF FORFEITURE OF BOND —The words "whenever it is proved" show that no person who has entered into a recognizance bond should be called upon to show cause why he should not have his recognizance declared forfeited without *prima facie* proof that the bond has been forfeited—11 R H C R 170. An order for forfeiture of recognisances or of bail bond must be made upon evidence in the case and not upon evidence taken in other cases—10 C L R 571, 12 W R 51.

The Court should record the grounds of forfeiture—3 P L T 391. Failure to do so will vitiate the proceedings—*Ibid*.

WHAT AMOUNTS TO FORFEITURE —Bonds for appearance should be strictly construed. If the bond requires the accused to appear on a day fixed, and if he appears on that day, the bond is complied with, and the failure of the accused to appear on any other day on which the case is called does not entail forfeiture of the bond—2 Weir 663, 4 W H C R APP 44, 36 CAL 749. Where bonds were taken from the accused and sureties to appear on a Sunday when the Court was closed and when on the next Monday the case was called on and the accused not being present the bonds were forfeited, it was held that as the bond required the attendance of the accused on the day fixed, *i.e.*, the Sunday and not on the next day, the failure of the accused to appear on Monday did not cause a forfeiture of the bond—2 C W N 519. If however the bond requires the accused to appear *from day to day* until the close of the trial, the bond is not illegal—6 W H C R APP 38 and the accused will forfeit his bond if he fails to appear on any adjourned hearing. Where a bond required the accused to appear 'on the first hearing or at other times required' and the accused appeared on the first day as mentioned in the bond, and was verbally directed to appear on a subsequent date on which he failed to appear, it was held that the

failure to comply with the verbal direction would entail forfeiture of the bond—2 Weir 658

Similarly, where a bond requires the accused, to appear before a particular Court, the failure of the accused to appear before another Court (to which the case has been transferred without the accused's knowledge) does not work a forfeiture of the bond—30 CAL 107, 36 CAL. 549, 18 A L J 631

As to forfeiture of bond for keeping peace or for good behaviour, see notes under sec 121 If some persons (Hindus) are bound down under section 107 owing to an apprehension of a breach of the peace on account of their interference with the slaughter of cows by the Mahomedans at a particular place, such persons are not debarred from instituting a civil suit to prevent the Mahomedans from slaughtering cows at that place, and the institution of the suit does not amount to a forfeiture of the bond which they were required to furnish—1 LAH 310

Illegal bonds cannot be forfeited —A bond which is null and void has no effect at all, such a bond cannot be forfeited Thus, where by mistake a bond under sec 110 was taken from a person ordered to execute a bond under sec 107 the bond is illegal, and an order forfeiting the security furnished under the bond is illegal and will be set aside—1901 P L 11 12 Where a warrant was issued to a woman in the first instance instead of a summons, without recording reasons under sec 90, the warrant is wholly illegal, and the bond given by the surety for the woman's appearance has no legal force and cannot be forfeited if the woman does not appear—1918 P. W R 7, 1907 P W. R 22

Death of accused —The death of the accused discharges the sureties from all liabilities "The object of the surety bonds is to ensure that the accused person shall not evade justice by flying from the jurisdiction of the Court But if the accused elects to die sooner than face his trial, that can hardly be a sufficient reason for forfeiting the bonds of sureties, it cannot impose upon them any moral obligation or responsibility to the Court"—18 BOM L R 683, 37 MAD 170

WHAT COURT CAN PROCEED UNDER THE SECTION —So far as bonds generally are concerned action may be taken under this section by the Court by which the bond was taken or by the Court of Presidency Magistrate or a Magistrate of the first class But in the case of a bond for appearance before a Court the tribunal indicated is the Court and there is no other tribunal Where the bond is for

appearance before a Sessions Court, the Deputy Magistrate cannot take action for the forfeiture of the bond. The Sessions Judge cannot delegate that function to the Deputy Magistrate under sec. 516 which deals with the levy of the amount only—14 C. W. N. 259. A personal recognizance to appear was taken from the accused by the Magistrate of Karjat. The accused having failed to appear on the day fixed, the Magistrate at Karjat issued a notice to the accused under this section. In the meanwhile, the accused was transferred to the Court of the Magistrate at Khalapur, who forfeited the bond and directed the accused to pay penalty. It was held that the Magistrate at Khalapur had no jurisdiction to make the order under this section as he was not the Magistrate who had taken the bond or before whom the accused had to appear—16 BOM L R 84. The Presidency Magistrate of Bombay has no jurisdiction under this section to order the forfeiture of a bond for appearance before the Police, taken by the Police under sec. 106 of the City of Bombay Police Act (Bom. Act IV of 1920)—42 BOM 100.

'Any person bound by such bond'—The Magistrate should call upon both the *principal and sureties*, and not the sureties only to pay the penalty named in the bond—1904 U B R 13.

NOTICE TO SHOW CAUSE—Before a warrant can be issued for the attachment of his property the surety should be called upon to show cause why he should not pay the penalty mentioned in the bond, and it should be clear on the face of the record that he was so called upon. A mere verbal and unrecorded order to show cause is not sufficient—15 W R 62. A summary order for recovering the amount due on the security bond from a surety without serving upon him any notice to pay the same or to show cause why it should not be paid, is invalid—9 W R 4.

PROCEDURE, IF PARTY APPEARS TO SHOW CAUSE—If the party appears to show cause he should be allowed an opportunity to cross-examine the witnesses upon whose evidence the rule to show cause was issued—4 CAL 865, 25 CAL 440. If the accused appears and shows cause and the Magistrate still considers that the recognizance should be forfeited it is his duty to record the evidence upon which it is proved that the accused had acted in such a way that it becomes necessary to forfeit the recognizance. There must be regular judicial trial and legal inquiry before punishment can be inflicted—12 W. R. 54. Before it can be declared that a bond executed by a surety is forfeited, there must be a formal finding arrived at

was properly convicted, by resummoning the witness on whose evidence the principal was convicted—21 ALL 86, 1903 P R 32 But in 25 CAL 410, and 11 CAL 77, it has been held that the mere production of the original record or a certified copy of the trial in which the principal was convicted would not be conclusive evidence to show that the accused has really committed an offence Such fact must be proved by evidence taken in the presence of the surety, unless it is admitted by him The present subsection adopts the view of the Allahabad and Punjab decisions “There has been a conflict of opinion whether a judgment convicting the principal in a bond taken under the Code and ordering the forfeiture of the bond is sufficient *prima facie* proof in proceedings under this section against the sureties The amendment permits the use of such a judgment as evidence in such proceedings and directs that the Court shall presume that such offence was committed unless the contrary is proved

—*Statement of Objects and Reasons (1914)*

The judgment of conviction is undoubtedly evidence against the principal himself Thus, where the bond is given by the person bound down to keep the peace the judgment convicting him of a breach of the peace is admissible in evidence against him and may form a sufficient basis for an order under this section, he having had an opportunity of cross-examining the witnesses on whose evidence the forfeiture is held established—25 CAL 410, 1 CAL 865

REVISION.—The High Court can revise, under secs 495 and 496 all orders made under this section or under sec 515—1905 P R 15 See notes under the next section

NATURE OF PROCEEDINGS UNDER THIS SECTION.—The proceeding to realise a penalty is of the nature of a civil proceeding (3 P L 1381) and the person against whom it is taken is competent to give evidence on oath in his own behalf—15 W R 87 It is not a criminal proceeding and no charge need be drawn up After the Magistrate has satisfied himself that the bond has been forfeited he can at once call upon the person concerned to pay the penalty The proceeding therefore cannot be held to be a “trial” in the sense of the Code—2 MAD 113

514-A. *If on any surety to a bond under this Code be-*

comes insolvent or dies, or when any
procedure in case of
insolvency or death of
surety or when a bond
is forfeited
of S 514, the Court, by whose order
such bond was taken, or a President

Magistrate or Magistrate of the first class, may order the person from whom such security was demanded to furnish fresh security in accordance with the directions of the original order, and, if such security is not furnished, such Court or Magistrate may proceed as if there had been a default in complying with such original order

This section has been newly added by the Cr P C Amendment Act 1923, to make up for the deletion of certain words in sub-section (6) of section 514. It also covers the case of a surety who becomes insolvent.

514-B. *If when the person required by any Court or officer to execute a bond is a minor, such Court or officer may accept, in lieu thereof a bond executed by a surety or sureties only*

Bond required from a minor
 "We have added a new section 514B to provide for the case of a bond being required from a minor.—*Report of the Select Committee of 1916*

515. All orders passed under S 514 by any Magistrate other than a Presidency Magistrate or District Magistrate, shall be appealable to the District Magistrate, or, if not so appealed, may be revised by him.

APPEAL AND REVISION—Under the old Codes of 1861 and 1872 there was no provision for appeal or revision of orders forfeiting a security bond under sec 514 see 2 MAD 169. This section makes provision for such appeal or revision.

Under this section all orders passed by the subordinate Magistrate shall be appealable to the District Magistrate but not to any 1st Class Magistrate—Ratanlal 484

Orders passed by a District Magistrate under this section may be subject to revision by the High Court—1905 P R 15

516. The High Court or Court of Session may direct any Magistrate to levy the amount due on a bond to appear and attend at such High Court or Court of Session.

Power to direct levy of amount due on certain recognizances
 This section empowers the Court of Session to delegate his power of levying fine to a Magistrate, but he cannot delegate his power of

initiating proceedings for forfeiture of the bond—14 C W N 209
(cited under sec 514)

CHAPTER XLIII

OF THE DISPOSAL OF PROPERTY

516-A. *When any property regarding which any offence appears to have been committed, or*

Order for custody
and disposal of pro-
perty pending trial in
certain cases

which appears to have been used for the commission of any offence, is produced before any Criminal Court during any inquiry or trial, the Court

may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial and, if the property is subject to speedy or natural decay, may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of

This section has been newly added by the Cr P C Amendment Act 1923. It is proposed to add to this chapter a new section to enable the Court to pass orders for the custody or disposal of property during an inquiry.—*Statement of Objects and Reasons* (1914) Under the old law, an order for disposal of property could be made only when the inquiry or trial was concluded (sec 517) but no order could be made while the offence committed in connection with such property was still under inquiry and the trial was not yet ended.—*Ratanlal Doss* This section enables a Court to make an order for disposal of property during the inquiry or trial

517. (1) When an inquiry or a trial in any Criminal

Order for disposal
of property regarding
which offence com-
mitted

Court is concluded, the Court may make such order as it thinks fit for the disposal by destruction, confiscation, or delivery to any person claiming to

be entitled to possession thereof or otherwise of any property or document produced before it or in its custody or regarding which any offence appears to have been committed, or which has been used for the commission of any offence

(2) When a High Court or a Court of Session makes such order and cannot through its own officers conveniently deliver the property to the person entitled thereto such Court may direct that the order be carried into effect by the District Magistrate

(3) When an order is made under this section in a case in which an appeal lies, such order shall not (except when the property is live-stock or is subject to speedy and natural decay) be carried out until the period allowed for presenting such appeal has passed or, when such appeal is presented within such period until such appeal has been disposed of

(4) Nothing in this section shall be deemed to prohibit any Court from delivering any property under the provision of sub-S (1) to any person claiming to be entitled to the possession thereof in his executing a bond with or without sureties to the satisfaction of the Court, engaging to restore such property to the Court if the order made under this section is modified or set aside on appeal

Explanation—In this section the term “property” includes in the case of property regarding which an offence appears to have been committed not only such property as has been originally in the possession or under the control of any party but also any property into or for which the same may have been converted or exchanged and anything acquired by such conversion or exchange, whether immediately or otherwise

CHANGE—This section has been amended by the Cr. P. C. Amendment Act 1923. The following changes have been introduced—

(1) The italicised words have been added in sub-section (1)

These words are added to elucidate the order for disposal of property produced before a Court by explaining that this means disposal by destruction confiscation restoration to the person claiming to be entitled to the possession thereof —*Statement of Objects and Reasons* (1914)

(2) Sub-section (3) has been substantially changed as shown in parallel columns. It allows one month for the presentation of an appeal or an application for revision where this is allowed —*Report of the Select Committee of 1916*

(1) When an order is made under this section such order shall not, except where the property is live-stock or subject to speedy and natural decay, and save as provided by sub-S (4), be carried out for one month, or when an appeal is presented, until such appeal has been disposed of

(3) Sub section (4) has been newly added "By this clause, the Court is enabled, if it sees fit, to restore the property to the possession of any person claiming to be entitled to it, who is willing to execute a bond for its return if need be"—*Statement of Objects and Reasons (1911)*

SCOPE OF SECTION—Under the Code of 1872 the words 'any property' were held to include all property seized by the Police and property voluntarily produced by any witness before the Court—12 B. H. C. R. 217

Under the Code of 1882, the operation of this section was much restricted, and the Court could make an order under this section only with reference to property with regard to which any offence had been committed or which had been used for the commission of any offence, otherwise not—24 CAL. 449, 14 CAL. 831, 1 C. W. N. 561, 2 Weir 665, 666, 668, 669, 1 BOM. 630, 10 BOM. 197, 17 BOM. 248, 2 HON. 814, and the order could be made only when that offence was actually under investigation or trial by the Court—Ratanlal 500, 1888 P. R. 16

Under the 1898 Code, the scope of the section has been again enlarged, and it seems to be extended to what it was before the Code of 1882. Thus an order can be made with regard to any property produced before the Court, or in its custody even though it has not been used for the commission of any offence or though no offence in regard to it has been committed—31 CAL. 317, 12 MAD. 9, 21 Cr. L. J. 114 (NAG), or though the offence actually under investigation is not in connection with the property or is not proved—2 Weir 666. The ruling in 2 Weir 665 is no longer good law. The decision in 30 CAL. 670 is erroneous as it did not notice the change in the law in the 1898 Code.

PROPERTY—'*Property produced in Court*'—When a portion of a property (e.g. a portion of salt or other article in bulk) is produced in Court and received in evidence is a sample the whole bulk is taken to have been produced before the Court and the Magistrate can make an order with respect to the entire bulk—2 Weir 670.

Property in respect of which an offence has been committed—The words mean property which has been the subject of offences like theft or criminal misappropriation—11 CAL. 986. Where the accused gave false information that his jewels were stolen and afterwards the jewels were found in his possession and the Magistrate sent for recovery of them and an offence under sec. 182 of P. C. committed.

the jewels under this section it was held that the order under this section was illegal, because the jewels were neither produced before the Court nor was there any offence committed with regard to them—3 C W N 597

The Magistrate can dispose of property stolen in British territory, though the Police might have seized it in foreign territory—1878 P R 20

Property used for the commission of an offence—This means property which has been instrumental in committing an offence e.g., guns or swords—31 CAL 986 But any instrument or thing which is too remotely connected with the commission of an offence cannot be confiscated under this section Thus it is illegal to confiscate a press in which a seditious matter has been published because the press is a too remote instrument and cannot be said to be property which has been used for the commission of the offence—31 CAL 986, 1907 P W R 37

A Magistrate convicting a person for gambling under sections 6 and 7 of the Madras Towns Nuisances Act cannot confiscate the money found in his waistcoat pocket when there was no evidence to show that the money was actually staked—41 MAD 644

So also a boat which has been used by the accused in going to commit a theft or in escaping from pursuit cannot be said to be property used for the commission of an offence—8 C W N 887, See also Ratulal 688 Similarly where the accused has been guilty of rash driving it is illegal to pass an order that the cart and pony of the accused should be sold and the proceeds paid over to the complainant as compensation—1911 P L R 9

Property must be movable—This section has no application to immovable property Where the accused disposed of the complainant of his garden by breaking the pad lock of its gate, and were convicted of the offence of criminal trespass the Court had no power to order the restoration of the garden to the complainant under this section or under sec 522—18 C W N 1146 See also 36 CAL 41 1900 A W N 81 and 12 L W 227 *Contra*—4 L B R 229, where the word property was held to include immovable property

Property must be in existence—No order can be made under this section with respect to property which was not in existence at the time of the offence Thus an innocent purchaser of a stolen cow cannot be ordered to deliver up the calf which was not even in ex-

hronic existence when the theft took place, but which was given birth to by the cow while she was in his possession—10 MAD 25

ORDER DISCRETIONARY—Orders under this section are discretionary. This section invests the Magistrate with a discretionary power and it is a rule of law that such power must be exercised judicially, *i.e.*, according to the sound principles of law and not in an arbitrary manner—11 BOM L R 16. This discretion is open to correction by the High Court where it has been exercised in violation of judicial principles—40 BOM 186

ORDER, WHEN CAN BE MADE—According to the words of this section an order can be made when any inquiry or trial is *concluded*. No order can be made before the conclusion of the trial. The object is to ensure that the Magistrate shall be in possession of all the facts of the case before disposing of the property. An order under this section cannot be passed simply on the complaint of a person while no inquiry or trial has *yet been held* upon such complaint—5 C L J 229. A Magistrate cannot pass an order under this section when dismissing a complaint under sec 203 because no inquiry or trial can be said to have been concluded in such a case—21 M L J 1. Similarly an order directing delivery of property cannot be made by a Magistrate without any criminal proceeding before him or any other Magistrate but merely on the application of the person in whose favour the order is made—6 C L J 707.

No order as to disposal of property can be made under this section, if the trial is barred under sec 103. The words 'when an inquiry or trial is concluded' cannot apply to a case in which the Court is prohibited from conducting a trial at all—1 L R R 229.

Where a person charged with criminal breach of trust in respect of certain jewels died before the day fixed for his trial and there was no trial no order could be made by the Magistrate under this section. The jewels were ordered to be returned to the person from whom the Police recovered them—20 MAD 375.

ORDER UNDER THIS SECTION—The old section stated that the Magistrate could make such order as he thought fit for the disposal of the property. This is a general term and the nature of the order to be passed for disposal was not specified. It depended upon the discretion of the Magistrate to say what order was to be passed having regard to all the facts of the case—11 BOM L R 16. Under the present section the word 'disposal' has been elucidated by certain explanatory words.

Order in a bribe case —When the accused was convicted of taking bribe and the money paid as bribe was deposited in Court by the complainant the Magistrate could order a portion of the bribe to be confiscated and the rest to be paid to the complainant—1873 P R 9

Order in respect of currency note —Where the accused stole a currency note from the complainant and changed it at the Government Treasury then on conviction of the accused for theft the currency notes should be delivered to the treasury and not to the complainant. Currency note is money and the ownership passes by mere delivery and the original owner cannot claim the amount as against the treasury—19 CAL 72 See also 40 BOM 186 7 M H C R 233 3 CAL 379 1 N W P H C R 292

So is the rule in respect of current coins. But *Bilashahi* coin is not current coin in British India and it is to be delivered to the complainant from whom it is stolen like any other common article or property—25 BOM 702

Order of forfeiture —An order of disposal under this section includes an order of forfeiture or confiscation—Ratanlal 492 This is now expressly provided for in the present section. In 5 N L R 50 it has been held that the *disposal* of property cannot be held to include confiscation or forfeiture as the penalty of confiscation or forfeiture has been expressly provided for in secs 62 121 etc of the Indian Penal Code, and in numerous other sections of other Acts and cannot be included in the general word *disposal* used in this section. See also 3 P L J 321 34 CAL 926 1907 P W R 37 These rulings are no longer correct in view of the express words of the present section.

An order for the confiscation of property which is the subject matter of an offence cannot be made without first giving notice to and hearing the person to whose prejudice the order would be. Want of notice would be good ground to set the order aside—17 Cr L J 207 (BUR)

Order of destruction of counterfeit coin —If the accused is convicted of an offence under sec 241 I P C and a counterfeit coin is found in his possession, the Magistrate can order the destruction of the coin—2 Weir 609

Order of restoration of property —If no offence is proved to have been committed in respect of any property produced before the Court, and the accused is acquitted the Magistrate should restore the property to the person from whom it was last taken—14

C P L R 60, 17 A W N 26 2 Weir 669, 18 C W N 959, 22 BOM 844, 1 C W N 561 2 Weir 668, 1 BOM 630, 10 BOM 197, 17 BOM 215 9 MAD 448, 14 CAL 831 5 W R 55 In such a case an order of confiscation is not proper—16 Cr L J 811 (MAD) See also 17 BOM L R 79, 42 MAD 9 The property should be restored especially when there is no finding in the case that it belongs to some one else—3 M L J 331

But if a case of theft fails because the dishonest intention of the accused is not proved the property can be restored to the complainant and need not be given back to the accused—16 M L J (Sh N) 4 So also where the Magistrate though he discharges the accused he believes that the property in his custody is the subject of some offence he is not bound to restore the property to the person from whom it was taken but can make an order of disposal under this section—9 MAD 418

A Magistrate cannot on dismissal of complaint restore the property to the accused if he disclaims the property In such a case the Court should retain the property until one or other of the parties has established his right in Civil Court—1913 P W R 37

If a complaint of theft of a certain property is dismissed on the ground of there being a *bona fide* dispute about the ownership of the property the Magistrate should take custody of the property sell it (if it is perishable) and retain the sale proceeds until they are shown to be payable to one or other of the parties either by virtue of a decree of Court or of an agreement between themselves—16 BOM L R 951 16 Cr L J 101 (MAD) In 2 Weir 667, it has been held that in such a case the Magistrate may deliver the property to the person from whom possession it was last taken with a condition that the property or its value must be forthcoming in case the rival claimant establishes a title But if it is found that the property belongs partly to the accused and partly to another person it is not allowed to deliver the property to both of them on their joint receipt—18 MAD 91

Order for delivery of found property on account of— A property which is found to have been the subject of an offence has been recovered should not be delivered to the owner of the property when it has been placed in the possession of the Court (19 Cr L J 788) without allowing the plaintiff to establish his title to it But when the evidence discloses that the property was obtained by fraud from the owner and sold to the plaintiff the property should be delivered to the owner and

the remedy of the pledgee was to bring a suit in the Civil Court to enforce his lien on the property—4 L. B. R. 13. But where certain jewels were given to the accused to sell but the accused instead of selling them gave them to another person who pledged them to a third person it was held that the jewels should be restored to the pledgee and not to the owner, because the owner having parted with the jewels to be disposed of for money was not entitled to the assistance of a Criminal Court in recovering them from a pawnee to whom they were so disposed of—3 B. R. L. T. 111. 4 L. B. R. 25. But if the jewels were given to a broker for sale and the broker sold the jewels and misappropriated the sale proceeds and was convicted of criminal breach of trust the jewels ought to be restored to the purchaser as if sold to the owner because the owner was committed to with respect to the jewels but with respect to the sale proceeds and therefore the Magistrate was not competent to make a decree with respect to the jewels which validly he sold to the purchaser—4 B. P. L. T. 170.

NO QUESTION OF TITLE.—An order under this section does not decide the question of ownership of the property. It merely decides the question of the right to possession till a Civil Court decides the question of ownership—11 B. R. L. T. 207. See also sec. 121.

IMPROPER ORDERS.—(a) *Deposit of property*.—This section does not place the property at the disposal of the Magistrate in the sense of allowing him to bestow it on charity. He is to make valid legal disposition thereof as he sees a right to do so, as he is restricted to a mode of disposal which may be a proper one for the owner in the possession of which he is acting for him—1 West 226.

(2) *Order of sale*.—The Magistrate is not to sell the property as a whole or in parts but he is to sell the whole or in parts as he sees fit—1 West 226.

(3) *Order of sale*.—The Magistrate is not to sell the property as a whole or in parts but he is to sell the whole or in parts as he sees fit—1 West 226. When the order is made for the sale of the property the Magistrate is to make a sale of the property as a whole or in parts as he sees fit—1 West 226. The order of the Magistrate is to be made as a whole or in parts as he sees fit—1 West 226. The order of the Magistrate is to be made as a whole or in parts as he sees fit—1 West 226.

(4) *Order of sale*.—The Magistrate is not to sell the property as a whole or in parts but he is to sell the whole or in parts as he sees fit—1 West 226. The order of the Magistrate is to be made as a whole or in parts as he sees fit—1 West 226. The order of the Magistrate is to be made as a whole or in parts as he sees fit—1 West 226. The order of the Magistrate is to be made as a whole or in parts as he sees fit—1 West 226.

C P L R 61, 17 A W N 26, 2 Weir 669, 18 C W N 939, 22 BOM 844 1 C W N 561, 2 Weir 668, 1 BOM 630, 10 BOM 197, 17 BOM 218 9 MAD 148, 14 CAL 831 5 W R 55 In such a case an order of confiscation is not proper—16 Cr L J 811 (MAD) See also 17 BOM L R 79, 42 MAD 9 The property should be restored especially when there is no finding in the case that it belongs to some one else—1 M L J 334

But if a case of theft fails because the dishonest intention of the accused is not proved the property can be restored to the complainant, and need not be given back to the accused—16 M L J (Sh N) 4 So also where the Magistrate though he discharges the accused believes that the property in his custody is the subject of some offence, he is not bound to restore the property to the person from whom it was taken but can make an order of disposal under this section—9 MAD 118

A Magistrate cannot on dismissal of complaint restore the property to the accused if he disclaims the property In such a case the Court should retain the property until one or other of the parties has established his right in Civil Court—1913 P W R 37

If a complaint of theft of a certain property is dismissed on the ground of there being a *bona fide* dispute about the ownership of the property, the Magistrate should take custody of the property, sell it (if it is perishable) and retain the sale proceeds until they are shown to be payable to one or other of the parties either by virtue of a decree of Court or of an agreement between themselves—16 BOM L R 951 16 Cr L J 101 (MAD) In 2 Weir 667 it has been held that in such a case the Magistrate may deliver the property to the person from whose possession it was last taken with a condition that the property or its value must be forthcoming to ease the rival claimant if it has a title But if it is found that the property belongs partly to the accused and partly to another person it is not allowed to deliver the property to both of them on their joint receipt—31 MAD 91

When a property is found to be stolen and the owner is recovered—A property which is found to have been committed should be delivered to the owner of the property when it has been proved to be his property—10 Cr L J 781 without allowing the public prosecutor to object to it But when the evidence discloses that the property was claimed by several persons the court must satisfy itself that the property should be delivered to the owner and

the remedy of the pledgee was to bring a suit in the Civil Court to enforce his lien on the property—1 L. B. R. 13. But where certain jewels were given to the accused to sell but the accused instead of selling them gave them to another person who pledged them to a third person, it was held that the jewels should be restored to the pledgee and not to the owner, because the owner having parted with the jewels to be disposed of for money was not entitled to the assistance of a Criminal Court in recovering them from a pawnee to whom they were so disposed of—3 B. & L. T. 111 1 L. B. R. 25. But if the jewels were given to a broker for sale and the broker sold the jewels and misappropriated the sale proceeds and was convicted of criminal breach of trust the jewels ought to be restored to the purchaser and not to the owner because the offence was committed not with respect to the jewels but with respect to the sale proceeds and therefore the Magistrate was not competent to make any order with respect to the jewels which validly belonged to the purchaser—4 B. & L. T. 170.

NO QUESTION OF TITLE—An order under this section does not decide the question of ownership of the property. If merely decides the question of the right to possession till a Civil Court decides the question of ownership—11 B. & L. T. 267. See sub-section (2).

IMPROPER ORDERS—(1) *Disposed in charity*—This section does not place the property at the disposal of the Magistrate in the sense of enabling him to bestow it in charity. He is to make such legal disposition thereof as seems right as to direct its restoration to some one to whom it seems to belong or permit it to continue in the possession in which it is found or otherwise—2 Weir 668.

(2) *Order regarding custody of children*—Orders regarding custody of children cannot be passed under this section—1 Weir 318.

(3) *Order for removal of building*—Where the accused built a new wall abutting on the road in contravention of the rules of the Municipality and the Magistrate after convicting the accused ordered the wall to be pulled down it was held that the order as to the removal of the wall was illegal—20 A. W. N. 81.

(4) *Order demanding security*—The Magistrate cannot take a bond from the accused to produce the property (with respect to which an offence is alleged to have been committed) in Court when not required. There is no provision of the law which enables a Magistrate to make an order demanding security. He can proceed under sec 91 in order to secure the production of the property, and on

or which has been in the custody of such superior Court—Ratanlal 196

519. When any person is convicted of any offence which includes, or amounts to, theft or receiving stolen property, and it is proved that any other person has bought the stolen property from him without knowing, or having reason to believe, that the same was stolen, and that any money on his arrest has been taken out of the possession of the convicted person, the Court may on the application of such purchaser and on the restitution of the stolen property to the person entitled to the possession thereof, order that out of such money a sum not exceeding the price paid by such purchaser be delivered to him

'Any money has been taken out of the possession, etc.'—The Magistrate can give compensation to an innocent purchaser only out of any money found on the person of the accused, when no money was found in the possession of the person convicted the Magistrate cannot grant compensation to the innocent purchaser out of the fine imposed on the accused—2 Weir 671, 1 BOM L R 119 3 BOM L R 761 See also Ratanlal 631

The Magistrate cannot call upon the owner to pay the purchase money of the stolen property to the bona fide purchaser, and an order delivering the property to the purchaser from the thief because the original owner would not pay him the purchase money is illegal—16 A W N 91

520. Any Court of appeal, confirmation, reference or revision may direct any order under S 517, S 518 or S 519 passed by a Court subordinate thereto, to be stayed pending consideration by the former Court, and may modify, alter or annul such order and make any further orders that may be just

'ANY COURT OF APPEAL'—These words are not necessarily limited to a Court before which an appeal is pending. The orders under Secs 517—519 are appealable quite independent of the fact whether an appeal has been preferred or not from the main order of conviction or acquittal—1 CAL 370 Therefore when a second class Magistrate restored certain property to the complainant when a charge was found to have been committed the District Magistrate

was competent to annul the order and restore the property to the person from whose possession it was taken, although there was no appeal pending before the District Magistrate—2 WEIR 673, 42 M L J 401 The words 'Court of Appeal' merely imply the Court to which appeals would ordinarily lie and do not mean that an appeal must lie in the particular case in which an order has been passed as to property—1911 P L R 96 But the Bombay High Court holds that the Court of appeal within the meaning of this section is the Court to which an appeal lies in the *particular case* and not the Court to which appeals would *ordinarily* lie from the Court deciding the particular case And therefore where a 1st class Magistrate, in acquitting the accused person charged with theft of cattle ordered the cattle to be restored to him but on appeal the Sessions Judge reversed the order and held that the complainant was entitled to the cattle, *held* that the Sessions Judge had no jurisdiction to act under sec 520 since he was not a Court of appeal in this case (because no appeal could lie to him against a judgment of acquittal)—42 BOM 664

But when an appeal has been preferred to a particular Court from the main order of conviction or acquittal no appeal or revision against an order as to the disposal of property can be preferred to any other Court The jurisdiction of the other Courts as to the revision of the order is suspended owing to the seizure of the whole case by the Court of Appeal—17 C P L R 107 But where the Appellate Court in dealing with an appeal has left untouched the order passed under Secs 517-519 there exists no bar to an application for revision of that order being made in any other Court having jurisdiction to revise that order—17 C P L R 107

Notice —An order under this section should not be passed without giving notice to the opposite party—35 BOM 253 See also 11 M L J 56 cited below

And make any further orders that may be just —These words did not occur in the old Codes and were for the first time introduced into the Code of 1898 Under the old Codes it was doubted whether the Appellate Court could direct *restitution* of property when setting aside the order of the Lower Court The addition of the words "and make just" in this Section gives such power to the Superior Court beyond any doubt See also 19 Cr L J 995 (PAT). Owing to this change in the Section, the following rulings

are no longer good law —9 W R 57, 14 CAL 84 1 BOM 630 2 BOM 575, 22 BOM 434

It is not necessary that an order as regards the property should be passed under this section by the Appellate Court *simultaneously* with the disposal of the appeal. Thus where a conviction for theft of bulls was set aside by the Appellate Magistrate, and *some time after* the disposal of the appeal the successor of the Magistrate in the Appellate Court passed an order for the restoration of the bulls to the accused, *held* that the second order was not illegal under sec 369 but that there was only an irregularity—43 M L J 87 41 M L J 56. If there is some interval between the date of the decision of the appeal and the passing of the order under this section, it is desirable that the parties should be given a reasonable opportunity of being heard before the passing of the order—44 M L J 56.

REVISION —When an order of the Lower Court has been set aside by the Sessions Court under this Section, the order of the Sessions Court is not appealable: the remedy is by way of revision to the High Court—18 A W N 10. The words 'any proceeding' in sec 135 are wide enough to empower the High Court to revise an order passed under this section—2 Weir 669.

521. (1) On a conviction under the Indian Penal Code, Destruction of libell. S 292, S 293, S 501 or S 502, the Court may order the destruction of all copies of the thing in respect of which the conviction was had and which are in the custody of the Court or remain in the possession or power of the person convicted.

(2) The Court may, in like manner, on a conviction under the Indian Penal Code S 272, S 273, S 274 or S 275 order the food, drink, drug or medical preparation in respect of which the conviction was had, to be destroyed.

522. (1) Whenever a person is convicted of an offence attended by criminal force or *show of force* or by criminal intimidation and it appears to the court that by such force or *show of force* or criminal intimidation any person has been dispossessed of any immovable property, the court may, if it thinks fit, *when convicting* that person or at any time within one month from the date

of the conviction order the person dispossessed to be restored to the possession of the same.

(2) No such order shall prejudice any right or interest in or in such immovable property which any person may be able to establish in a civil suit.

(3) An order under this section may be made by any Court of appeal, confirmation, reference or revision.

CHANGE.—The italicised words and sub-section (3) have been added by the Cr. P. C. Amendment Act 1923. This amendment provides for the order of restoration being passed within one month from the date of conviction; secondly it extends the scope of the section to ouster from possession by show of criminal force or criminal intimidation; and thirdly it gives power to an Appellate Court or to the High Court in revision to pass such an order.—*Statement of Objects and Reasons* (1911).

SCOPE OF SECTION.—Sec. 522 which enables a Magistrate to deprive a wrongdoer of possession is limited only to cases in which possession has been obtained by criminal force attending an offence and the wrongdoer has been convicted of such offence—2 Weir 98.

Is convicted.—An order under this Section should not be made where the accused person has not been convicted of an offence attended by criminal force—12 C. W. N. 260, 47 ALL. 651. Thus no order can be passed under this Section where the trespass which the accused was alleged to have committed was not a criminal trespass but merely a civil one—12 C. W. N. 261.

CRIMINAL FORCE.—To justify an order under this Section the Court must find that the offence of which the accused is convicted was attended with criminal force as defined in Sec. 370 of the I. P. Code and therefore where a person was convicted of criminal trespass in which no criminal force was used the Magistrate could not make an order under this Section—25 ALL. 341, 27 CAL. 174, 3 L. B. R. 20, 20 Cr. L. J. 270 (PAT), 2 P. L. T. 120, 1919 P. R. 16, 1906 P. R. 12, 23 W. R. 54, 24 O. C. 152 (1922) M. W. N. 756. If the trespass is attended with the use of sticks and *batto* the offence is one attended with criminal force and an order under this section is justified—45 ALL. 25.

But the words ('attended by criminal force') do not mean an offence of which criminal force is an *ingredient* to hold such view is to place a narrow construction on the general words—26 MAD. 49, 31 CAL. 691. *Contra*—25 CAL. 434, 23 W. R. 54, 12 L. W. 227 and 4 P. L. W.

329 where the words were interpreted to mean an offence in which criminal force formed an ingredient

The word 'force' means force to a *person* as defined in Section 219 I P C and not force to *property*. Thus where the accused dispossessed the complainant of his garden by breaking open the padlock of the gate but used no force or violence to any person, it was held that the case did not fall under this Section—18 C W N 1116. Where the accused committed rioting and used violence to the complainants rioting but not to any person it was held that this Section did not apply—18 C W N 1150. This section does not apply to a case of criminal trespass and dispossession of the complainant unless it is found that trespass was attended with the use of criminal force on the *person* of the complainant—2 P L T 120.

SHOW OF FORCE.—An order may now be passed under this section even if the offence is attended with mere show of force. On this point there was a conflict of opinion prior to the present amendment. In some cases it was held that there must be *actual* criminal force and not *mere show* of criminal force. The offence of being members of an unlawful assembly is one in the composition of which the use of criminal force does not enter, though the show of criminal force may exist. Therefore an order under this Section could not be passed on conviction for being members of an unlawful assembly—25 CAL 131, 5 C W N 250, 27 CAL 174, 23 BOM 191, 4 P L W 329, 20 Cr L J 270 (PAT). But these cases were dissented from in 11 C W N 167, 1918 U B R 1st Qr 111, and 20 Cr L J 115 (H R) where it was held that an order as to possession of property could be passed by a Magistrate even where a person was dispossessed by mere show of criminal force. The Legislature has given effect to the ruling in the latter set of cases by inserting the words "show of force or criminal intimidation" in this section.

DISPOSSESSION.—To justify an order under this Section it must be shown that a party has been dispossessed by criminal force. Where there was no evidence of such dispossession an order under this section cannot be sustained—2 Weir 671, 1917 P W R 38. There shall be an express finding that the person in whose favour the order was made had been dispossessed by the use of criminal force—23 W R 51. When the accused was convicted of rioting and an order was passed under this section to the effect that one of the witnesses be put in possession of certain land until ousted by a Court of competent jurisdiction, it fell that as there was no evidence that the

witness had been *dispossessed* by criminal force, the order of the Magistrate was bad—2 Weir 671 If the Magistrate purported to act under sec 145, he should have instituted separate proceedings

Where it is found that neither party is in *actual* possession, an order under this section cannot be made—2 Weir 675

Order affecting possession of third person—The object of the provisions of this section is to enable the criminal Court, by a summary order, to restore the state of things which existed at the time of the dispossession by the convicted person or persons. It cannot go behind the state of affairs at the time of forcible ejection leading to the criminal prosecution. Where an auction purchaser of a mortgaged property was put in possession of the property by ejecting the tenant and the auction purchaser was forcibly dispossessed by the accused it was held that upon the conviction of the accused the auction purchaser was entitled to be restored to actual possession which he held of the house at the time of his ejection, that the tenant had no right to any possession and that he should seek his remedy in the Civil Court—5 C W N 374

ORDER WHEN CAN BE MADE—An order under this section, although it can be made only on the conviction of an offence, is an independent order and need not be made simultaneously with the conviction—23 BOM 494 It is not essential in law that an order restoring possession should find a place in the actual judgment. It must be immediate, that is directly arising out of the judgment of the Court convicting in the case and without any fresh materials having in the meantime being produced—14 Cr L J 172 (CAL), see also 16 A L J 489 It is proper if it is made within a reasonable time from the date of conviction—1 B R (1918) 3rd QR 111 20 Cr L J 115 (BUR) It is not necessary for the Magistrate to pass an order under this section simultaneously with the conviction and there is no illegality if he passes the order at any time after the conviction if the cause of delay in applying for the order is fully explained to his satisfaction and the complainant moves the Court promptly after the cause of delay has ceased—1914 P R 15 In this case there was 20 months delay owing to the filing of a civil suit by the accused and the Court excused the delay since the complainant applied for restoration immediately after the civil suit had terminated in his favour. It should be noted that the present section as now amended gives *only one month's time*. In 4 C W N 308 however, it has been held that an order under this

sentence can only be made *simultaneously* with the order of conviction of the accused, and cannot be made *subsequently*. But the ruling is no longer good law in view of the words "or at any time within one month" newly added in this section. "We do not think that an order of restoration need be made *simultaneously* with the conviction, but we think that any application for such an order should be made promptly, and that one month is sufficient time to allow for this purpose—*Report of the Select Committee of 1916*

NOTICE TO PARTY—Since an order under this section is to be immediate, that is directly arising out of the judgment of the Court convicting the accused, and without any fresh materials having in the meantime been produced, it is not necessary that any notice should go to the accused before the order is passed—14 Cr. L. J. 152 (CAL.) But the Magistrate should give the party an opportunity to show cause as a matter of due exercise of judicial discretion—3 L. B. R. 20. Where an order under this section was made in respect of a house on a conviction of rioting and hurt, and the Sessions Judge on appeal set aside the conviction but directed the order under sec. 522 to be in abeyance pending a reference to the High Court and subsequently in the absence of the complainant declared the order to be void it was held that the Sessions Judge's order should not have been made behind the back of the party affected by it—21 C. W. N. 862.

SUBSECTION (2)—*Limitation for civil suit*—See Art. 47 of the Indian Limitation Act, which provides a period of three years from the date of the order.

SUBSECTION (3)—This subsection has been newly added. Prior to this amendment it was held that an Appellate Court had no power to pass an order under this section where the convicting Magistrate had not passed any order hereunder—39 CAL. 1051, 1910 P. R. 14, 1911 P. W. R. 1. These rulings are no longer correct.

APPEAL OR REVISION—Since an Appellate Court can pass an incidental or consequential order under section 424 (d), an order under this section (which is in the nature of an incidental or consequential order) is also subject to appeal and is similarly subject to the revisional powers of the High Court under sec. 439—29 CAL. 521. The ruling in 25 CAL. 699 is not correct in view of section 424 (d). An Appellate Court may set aside an order under this section while affirming the conviction—19 C. W. N. 170. The High Court

his full power to interfere with an order passed by a Magistrate, although this section is not mentioned in sec 520—36 CAL 44

523. (1) The seizure by any police officer of property taken under S 51 or alleged or suspected to have been stolen, or found under

Procedure by police
upon seizure of prop-
erty taken under S
51 or stolen

circumstances which create suspicion of the commission of any offence, shall be forthwith reported to a Magistrate,

who shall make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or, if such person cannot be ascertained, respecting the custody and production of such property

(2) If the person so entitled is known, the Magistrate may order the property to be delivered

Procedure where
owner of property
seized unknown

to him on such conditions (if any) as the Magistrate thinks fit If such person is unknown, the Magistrate may

detain it and shall, in such case issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish the claim within six months from the date of such proclamation

SECTIONS 517 AND 523—Section 517 applies only when an inquiry or trial in a Criminal Court is concluded But Sec 523 applies even though there has been no inquiry or trial as in case where a complaint has been dismissed under sec 203—24 M L J 7

SCOPE OF SECTION—This section applies only to property seized by the Police of their own motion in the exercise of powers conferred on them i.e by secs 51 54 161 and 165 Such property should be disposed of by the Magistrate under this section But property seized by the Police under a search warrant issued by the Magistrate during the course of an inquiry or trial comes under sec 517 and not under this section—17 BOM 248 So also this section does not apply where the property is seized by the Police on the complaint of certain persons claiming as owners thereof—29 MAD 175 (377) *Contr*—26 BOM 552 where it has been held that the words 'seized by the Police' apply equally whether the seizure was under a warrant by the Magistrate or without such warrant, and

the Magistrate has power under this section to dispose of property seized under a search warrant

Property —Standing crops do not come under the provisions of this section—23 BOM 491

ORDER UNDER THIS SECTION —Under this section the Magistrate may make 'such order as he thinks fit' The discretion given by these words should be properly exercised If there is no evidence as to the ownership of the property, it should be delivered to the person from whose possession it was taken—5 BOM L R 25, 17 BOM L R 79, 1 L B R 14, 8 S L II 111 A Magistrate is also competent to order the property seized by the Police to be made over to the complainant, if the Magistrate finds on the materials before him that the complainant is entitled to the property—12 BOM L R 212 But if the property is alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence, the Magistrate can pass order that the property should be at the disposal of Government even though the complainant may be entitled thereto—24 M L J 1 So also, if neither party succeeds in establishing his title to possession, the property would be at the disposal of the Government—*Ibid*

Conditional order regarding property —The Magistrate cannot demand security (either under this section or under sec 517) from the person in whose possession the articles are for their production, if required—7 C W N 522 (see this case cited under sec 517) But if before the inquiry or trial it becomes necessary to pass an immediate order to save the property from possible loss or decay, the Magistrate can order the property to be delivered to one of the parties on certain terms—5 C W N 115

to the property 'It does not appear that it is authorised to usurp the functions of a civil Court and convert the trial of an accused person into an inquiry in regard to property'—29 MAD 375 (378). If there is no question that the property was taken out of the complainant's possession, the Magistrate can return the property to the complainant without making any inquiry—Ratanlal 365

When the Magistrate has issued a proclamation under subsection (2) he is not bound to make any inquiry, till after the expiry of the six months from the date of proclamation—22 CAL 761

EVIDENCE —The Magistrate need not hold an elaborate inquiry but may proceed on such evidence as is available and pass an order under this section. He can base his order on a mere statement made by the accused to the Police that the property was stolen by him from the adjudged owner—9 BOM 131. The Magistrate is not bound to make a judicial inquiry by examination of witnesses on oath before making an order under this section. All that the law requires is that he should have materials before him to satisfy himself as to who is entitled to possession—12 HCR L T 265 4 LAH 38. An order under this section can be passed on police reports and papers alone without any independent inquiry on oath with regard to the question of possession—4 LAH 38

Question of title —The Magistrate holding the inquiry should not decide any question of title but must be confined only to the question of possession—12 BOM L R 232. See also 29 MAD 375 cited above. The order under this section does not conclude the right of any person. The real owner may proceed in the civil Court against the holder of the articles for damages—9 BOM 131 5 P L J 321

PROCLAMATION —When the person legally entitled to the property is known the Magistrate need not make a proclamation nor wait for six months before delivering the property to him. He may deliver the property to the person entitled whether he has issued a proclamation or not. If he has issued a proclamation that fact will not invalidate an order for immediate delivery of the property to such a known person—3 L B R 197

REVIEW —Orders under this section cannot be reviewed. When once a Magistrate has passed an order restoring possession of the property, he cannot reconsider it and pass another order subsequently—4 BOM L R 12

REVISION —The High Court in revision has power to examine orders passed under this section—4 LAH 38. The High Court has

power in revision not only to set aside a Magistrate's order for the disposal of property passed under this section, but also to order re titution of the property to the person entitled thereto—12 BUR L T 165

524. (1) If no person within such period establishes his claim to such property, and if the per

Procedure where no claimant appears within six months son in whose possession such property was found, is unable to show that it was legally acquired by him, such property shall be at the disposal of the Government, and may be sold under the orders of the Presidency Magistrate, District Magistrate or Subdivisional Magistrate, or of a Magistrate of the first class empowered by the Local Government in this behalf

(2) In the case of every order passed under this section, an appeal shall lie to the Court to which appeals against sentences of the Court passing such order would lie

"Unable to show that him" —When the proclamation has been issued under Sec 523 and the six months have expired then the provisions of Sec 524 come in and the person in whose possession the property was found can come up and prove his title to the property—22 CAL 761 If he is unable to shew that the property is his own, it may be forfeited to Government But the words unable to show that it was legally acquired by him do not reverse the presumption laid down in Sec 110 of the Evidence Act, i.e. it should be presumed that the accused is the owner of the property in the absence of any proof to the contrary Where the police seized certain property from the accused and no claimant came forward to claim the same though a proclamation was issued and several items of the property bore the name of the accused, but the Magistrate said that the evidence produced by the accused was suspicious though no evidence was elicited to show clearly that the accused's claim was false it was held that under the circumstances the proper and safest course is to follow the presumption laid down in Sec 110 of the Evidence Act—8 S L R 111 Where no offence is found to have been committed the property should be returned to the accused and not confiscated to the Government—17 BOM L R 70

APPEAL. —The appeal¹ allowed by Subsection (2) is an appeal in the full sense of Chapter XXXI, and the provisions of that chapter

must be fully complied with. Where an appeal to the Court of Session from an order of the District Magistrate was treated as a sort of miscellaneous application and decided *ex parte* without a notice to the other party, and none of the procedure of Chapter XXXI was followed the order of the Sessions Judge was set aside—1 A W N 150

CIVIL SUIT —As this Section allows an appeal from an order under the Section, it is doubtful whether the law contemplates a remedy by writ—19 BOM 668

525. If the person entitled to the possession of such property is unknown or absent and the property is subject to speedy and natural decay, or if the Magistrate to whom its seizure is reported, is of opinion that its sale would be for the benefit of the owner or that the value of such property is less than ten rupees, the Magistrate may at any time direct it to be sold, and the provisions of Ss 523 and 524 shall, as nearly as may be practicable apply to the nett proceeds of such sale

The italicised words have been added by the Cr P C Amendment Act 1923

CHAPTER XLIV

OF THE TRANSFER OF CRIMINAL CASES

High Court may transfer case or itself try it **526.** (1) Whenever it is made to appeal to the High Court —

- (a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or
- (b) that some question of law of unusual difficulty is likely to arise, or
- (c) that a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same, or
- (d) that an order under this section will tend to the general convenience of the parties or witnesses, or
- (e) that such an order is expedient for the ends of justice, or is required by any provision of this

Code, it may order—

- (i) that any offence be inquired into or tried by any Court not empowered under Ss 177 to 184 (both inclusive) but in other respects competent to inquire into or try such offence
- (ii) that any particular * * * case or appeal or class of * * * case or appeals, be transferred from a Criminal Court subordinate to it, authority to any other such Criminal Court of equal or superior jurisdiction
- (iii) that any particular * * * case or appeal be transferred to and tried before it, if or
- (iv) that an accused person be committed for trial to itself or to a Court of Session

(2) When the High Court withdraws for trial before it, if any case from any Court other than the Court of a Presidency Magistrate it shall, except as provided in S 267, observe in such trial the same procedure which that Court would have observed if the case had not been so withdrawn.

(3) The High Court may act either on the report of the lower Court or on the application of a party interested or on its own initiative.

(4) Every application for the exercise of the power conferred by this section shall be made by motion which shall, except when the applicant is the Advocate General, be supported by affidavit or affirmation.

(5) When an accused person makes an application under this section the High Court may direct him to execute a bond with or without sureties conditioned that he will if *ordered* pay any amount which the High Court has power order this action to award by way of costs to the person *off* and the application.

(6) Every accused person making any such application shall give to the Public Prosecutor or if applicant notice in writing of the application for order thereon together with a copy of the grounds on which it is made and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

(6A) *If here any application for the exercise of the power conferred by this section is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of costs to any person who has opposed the application any expenses reasonably incurred by such person in consequence of the application.*

(7) Nothing in this section shall be deemed to affect any order made under S 197

(8) If, in any criminal case
Adjourn- or appeal, before
ment on ap- the commence-
plication under this ment of the hear-
section ing, the Public

Prosecutor, the complainant or the accused notifies to the Court before which the case or appeal is pending, his intention to make an application under this section in respect of the case, the Court shall exercise the powers of postponement or adjournment given by S 344 in such a manner as will afford a reasonable time for the application being made and an order being obtained thereon, before the accused is called on for his defence, or, in the case of an appeal, before the hearing of the appeal

(8) If, in the course or any
Adjourn inquiry or trial or
ment on ap- before the com-
plication under this mencement of the
section hearing of any ap-
peal, the Public

Prosecutor, the complainant or the accused notifies to the Court before which the case or appeal is pending his intention to make an application under this section in respect of such case or appeal, the Court shall adjourn the case or postpone the appeal for such a period as will afford a reasonable time for the application to be made and an order to be obtained thereon

(9) Notwithstanding anything heretofore contained, a Judge presiding in a Court of Session shall not be required to adjourn a trial under sub-section (8) if he is of opinion that the person notifying his intention of making an application under this section has had a reasonable opportunity of making such an application and has failed without sufficient cause to take advantage of it.

CHANGE —In clauses (ii) and (iii) the word 'criminal' has been omitted in subsection (5) the words "any amount application" have been substituted for the words "the costs of the prosecutor"; subsections (6A) and (9) have been newly added, and subsection (8) has been materially altered as shown in parallel columns. The reasons are stated below in their proper places.

SECS 526 AND 269 —Sec 269 in no way limits the powers of transfer conferred on the High Court by this Section—10 S L R 151. In transferring a case no consideration should be had to the fact that by the transfer to a particular district the accused will have the benefit of a trial by jury, where previously he had none. The real question is that of convenience of parties—8 C L J 59.

CONDITIONS PRECEDENT —(1) Before an application is made to the High Court for transfer the *District Magistrate* must be moved first. The High Court will ordinarily interfere only in the last resort.—6 BOM L R 480. (2) The case to be transferred must be before a *competent Court*. The High Court cannot under this Section transfer a case which it is not properly before a Subordinate Court of competent jurisdiction to receive and try it—10 BOM 271, 9 ALL 191, 9 MAD 356, 17 L W 69, 6 CAL 30, 7 BOM L R 101, 3 BOM L R 121. If the complaint has been made to a Magistrate who is not competent to take cognisance of the case, he shall return the complaint for presentation to the proper Court with an endorsement to that effect (see Sec 201). (3) The application for transfer must be made *before* disposal of the case. A case cannot be transferred after acquittal. This Section contemplates interference by the High Court by way of transfer, when a person is aggrieved or injured by any order of the Magistrate before the disposal of the case. It is not intended to give power to interfere in order to set aside an acquittal or discharge—2 CAL 290, 1 BOM L R 782.

held that proceedings under section 145 being criminal proceedings, could be transferred from one Court to another, whereas the contrary view was taken in 25 BOM 179 and 8 S L R 215

The Legislature has now wisely omitted the word 'criminal' so that all cases inquired into and tried in any criminal Court can now be transferred under this section. "The word *criminal* has been omitted to make it clear that the powers of a High Court to transfer criminal cases extend to the transfer of miscellaneous proceedings under the Code —*Statement of objects and Reasons* (1914)

Proceedings under Sec 14 of the Legal Practitioners Act are neither civil nor criminal but as they are held in criminal Courts they can be transferred from one Court to another under this section. The contrary view held in 1868 P R 41 is no longer correct.

Future cases cannot be transferred —The High Court can transfer actual cases only i.e. cases actually pending before a Court it cannot direct that cases that may be filed in future should when filed not be heard by the authority to which they are presented but should be transferred to some other Court—Ratanlal 973

CLAUSE (a) —POINTS TO BE NOTED BY HIGH COURT —
When sufficient grounds are made out for a transfer the High Court is bound to act under this Section. It is precluded from considering the possible effect which the transfer may have on the reputation or authority of the Magistrate concerned—10 C W N 441. One of the most important duties of the High Court is to create and maintain confidence in the administration of justice, and this can only be done by giving to every citizen an assurance that so far as practicable he will never be forced to undergo a trial by a Judge or Magistrate when he has reasonable apprehension that a fair and impartial trial cannot be obtained from the Judge or Magistrate—1 S L R 8. In transferring a case from one Magistrate to another the High Court ought not to be guided by the impressions produced in its own mind as to the impartiality of the Magistrate but must look to the effect likely to be produced in the minds of the parties and their witnesses by the selection of a Magistrate whose personal antecedents or circumstances have however unavoidably connected him with either one party or the other—25 BOM 179. In determining whether an application is reasonable it is the duty of the High Court to place itself in the position of the accused and to consider the facts and circumstances attending his position. Abstract reasonableness ought not to be the standard—33 CAL 1183 15 CAL 455 8 C W N 77, 29 CAL 211

DUTY OF MAGISTRATES—It is the duty of the Magistrate not only to conduct the case impartially, but also to conduct himself in such a manner that the parties may have absolute confidence in him that only full justice will be dealt out to them. If the Magistrate though not actually biased still conducts himself in such a manner and utters such words as to impair the confidence of any of the parties then there is good ground for the transfer of the case from his file to that of any other Magistrate—25 CAL 727, 28 CAL 709. Magistrates should not fail to remember that it is their duty no less to preserve an outward appearance of impartiality than to maintain the internal freedom from bias, which is incumbent on all judicial officers and that if they allow their executive zeal to appear to outrun their judicial discretion, their action is certain to induce the party to make an application to the High Court for transfer—1 S L R 8.

Reasonable apprehension of not having a fair trial—The basis of all applications for transfer of criminal cases must be that the accused must have a reasonable apprehension that he will not receive a fair trial—1 P L J 399. When there are circumstances existing to create a reasonable apprehension in the mind of the accused that he will not receive a fair and unprejudiced trial, a transfer should be directed though there is really no bias in the mind of the Court from which the transfer is sought and though the circumstances may be capable of explanation—2 Weir 678, 28 CAL 297, 21 CAL 495, 31 CAL 1181, 15 CAL 217, 10 ALL 64, 25 BOM 179, 3 LAL 113, 15 C P J R 102, 1 P L R 522, 2 P L R 297, 20 Cr L J 506 (PAT).

What is a reasonable apprehension should be decided according to the contents of the case and in reference to the special circumstances—13 CAL 1181, 1 P L J 191. The doctrine that a reasonable apprehension in the mind of the accused that he will not get a fair and impartial trial is a sufficient ground of transfer, is no doubt sound, but in applying the doctrine regard must be had to the circumstances of the case—30 CAL 921. It is not sufficient if the accused merely alleges that a fair and impartial trial cannot be had. He should also place before the Court the facts and circumstances from which he is led to entertain such belief and if these will reasonably give rise to that belief a transfer will be made—10 O C 195, 107 P W R 13. It is not every kind of apprehension that will entitle an accused person to get a transfer of the case, the apprehension of the accused must be shown to be reasonable—1 P L T 111. The High Court will not order a transfer solely in deference to the susceptibility of the

accused when there is no reasonable ground for the apprehension—10 C W N 441 In a Sind case it is laid down that the apprehension to be established must be an apprehension reasonable in the opinion of the Court, and not such apprehension as would appear reasonable in the mind of the accused The Court itself should be satisfied on that point and the real test is not what the accused may reasonably have been led to think about it—10 S L R 183 But this would be putting a wrong construction on the section See 25 BOM 170 cited above For, it has been rightly observed that the law of transfer of cases is based not so much upon the motives which might be supposed to bias the Judge as to the *susceptibilities of the litigant parties* One important object at all events is to clear away everything which might engender suspicion and distrust of the tribunal and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security—2 P L T 198 *Sergeant v Dile* 2 Q B D 558 (567)

Instances of reasonable apprehension—When the District Magistrate and the Sessions Judge expressed an opinion that an impartial jury could not be obtained if the case was tried in the District it was held that the expression of such belief was sufficient to shake the confidence of the public and of the parties in the fairness and impartiality of the jury and to create in their minds a reasonable apprehension that a fair and impartial trial could not be had if the case was tried there and therefore an order for transfer was expedient for the ends of justice under this section—25 CAL 727 When in a case of petty theft, the Magistrate issued non bailable warrants against the accused in the first instance and exacted very heavy bail from them there is a sufficient ground for apprehension that fair trial cannot be had and therefore a transfer should be directed—8 C W N 289 Where in a summons case the Magistrate had issued a warrant without any apparent reason and there was reason to believe that in other proceedings connected with the case the Magistrate had formed an opinion unfavourable to the accused there ought to be a transfer of the case—18 CAL 247 Where it appeared that during the course of an inquiry preliminary to commitment some entries in the ordersheet were not made by the Magistrate daily as required by the rules of the High Court, and certain orders were not recorded either on the particular day or possibly even on the following day, and in one instance the Magistrate did not record the order with reference to the order of the proceedings before him and it further appeared that the Magistrate even after the receipt of

ible of explanation and may have happened *without any real bias* in the mind of the Magistrate—2 Weir 678, 18 CAL 247, 23 CAL 195, 25 CAL 727 28 CAL 709, 28 CAL 297, 33 CAL 1183, 19 ALL 96, 25 BOM 179 1 P L T 522, 20 Cr L J 366 (PAT), 15 C P L R 192 The grounds of transfer need not show actual bias, but it is sufficient if there are grounds alleged for suspecting bias But if false charges of bribery and corruption are trumped up against the Magistrate no transfer will be ordered, even when there are sufficient grounds for suspecting bias—2 L B R 220

Although each of the circumstances alleged may not be by itself sufficient to show that there was bias on the part of the Magistrate, a transfer would nevertheless be justified where having regard to all the circumstances taken together the accused might not unreasonably apprehend that he would not have a fair trial—9 C W N 619, 1 P L T 652 1 P L I 522

Expression of opinion on the case —A Magistrate who has already formed a decided opinion about the case before him and has expressed a strong opinion as to the guilt of the accused is precluded from trying the case and a transfer ought to be directed—10 BOM L R 201 32 ALL 612 7 A L J 813 20 CAL 857 18 CAL 217 8 C W N 611, 1 C W N 278, 20 Cr L J 366 (PAT), 23 Cr L J 168 6 BOM L R 856 Retrials are ordered to be held by another Magistrate on this ground—20 MAD 388 7 C L J 210 8 C L I 59

Expression of opinion in a connected or counter case —A Judge is not disqualified from trying a case of rioting merely because he has decided a counter case of rioting and expressed an opinion But the Judge should be careful to confine himself in the trial to the evidence before him and should not let his mind be influenced by the evidence given in the former case—1 C W N 126 See also 13 CAL 901 Judges are presumed to be upright men who will approach each case from the point of view of that case alone and not permit their minds to be affected in any way by anything that has gone before that case The mere fact that the Judge in a former proceeding arising out of a counter case to the one now coming before him has expressed certain views upon the evidence in the former case as to which of the two versions is correct is not a reasonable ground of apprehension that the accused will not have a fair trial—1 P L I 361 Interest or bias on the part of the Magistrate is not to be inferred from opinions formed on evidence judicially recorded, otherwise a Magistrate would after

disposing of one of two counter cases be disqualified from trying the other—1 S L R 37 6 BOM L R 1092 But when in a case and a counter case, the Magistrate in discharging the accused in one case expressed a strong opinion on the guilt of the accused in the other case a transfer of the case pending will be directed—30 MAD 233 Where in a proceeding under Sec 110 it appeared that the Magistrate had expressed his opinion in a very strong language against the petitioner in a connected case a transfer should be directed—1916 P L R 78

Inspection by Magistrate —The inspection of a locality by the Magistrate acting fairly and judiciously during the inspection is not only not illegal but is under certain circumstances proper for the right understanding of the evidence The Magistrate does not constitute himself a witness by a mere local inspection and such inspection is no ground for transferring the case—1901 P L R 89 1901 P R 13 But if the Magistrate goes to inspect the locality accompanied with one party (e.g. a partisan of the complainant) the action of the Magistrate is improper and a sufficient ground for transferring the case—1901 P L R 105 12 C W N 748 It is not only not objectionable but in many cases highly advisable that a Magistrate trying a criminal case should himself inspect the scene of occurrence in order to understand fully the bearing of the evidence given in Court But if he does so he should be careful not to allow any person on either side to say anything to him which might prejudice his mind one way or another If the Magistrate goes out of his way in making a local inspection and makes the inspection without notice to several of the accused and in their absence the accused may very rightly apply for transfer under this section—21 Cr L J 166 6 O L J 640, 19 ALL 302 39 CAL 476 See also notes under sec 556 under heading 'Local inspection'

Magistrate test a witness in the case —The fact that the Magistrate may be a witness in the case for the defence is a ground of transfer But in applying to the High Court for transfer on that ground, it must be shown that the Magistrate will be a necessary and essential witness for the defence—19 Cr L J 632 (CAL) When in a criminal case the evidence of the Magistrate is found necessary by the defence, it is proper that the case should be transferred to another Magistrate—26 ALL 536 In 17 A W N 17, it has been held that the mere fact that a Magistrate in whose Court a case is pending may be summoned as a witness for the defence is not of itself a ground for the transfer

WHAT ARE NOT GROUNDS OF TRANSFER —(1) Want of temper and discretion on the part of the Magistrate in dealing with the petitioner's written statement and failure to give satisfactory explanation to the High Court are not, by themselves, sufficient grounds for granting an application for transfer—2 W R 58

(2) The mere fact that the complainant is a man of importance in the place where the trial is held is not sufficient to justify a transfer to another place—Ratanlal 171

(3) A *bona fide* mistake of law is not a ground of transfer. Thus in a case under sec. 380 I P C the Magistrate should at once give the accused an opportunity to cross-examine the prosecution witnesses if he so desires, even though the charge may not be framed, but a refusal to give such opportunity when the Magistrate acts *bona fide* under a mistaken view of the law, is not a good ground for transferring the case—8 C W N 838. So also the mere fact that a trial Court has committed an error of judgment in admitting an evidence is no ground of transferring a case from such Court—20 Cr L J 609 (PAT). So also errors of judgment e.g. refusing to summon a prosecution witness for cross-examination, insisting on his being summoned as a witness for the defence, disallowing objections as to the fitness of a person to serve as assessor, and permitting the prosecution to examine in-chief a witness on the substantive case of the prosecution after the defence has disclosed its case in the cross-examination of the witnesses, are insufficient by themselves to justify a transfer of the case—1 P L T 2

(4) The fact that the Magistrate has released the accused on bail and thus shown a tendency to treat the accused with undue leniency is not a ground of transfer—22 BOM 511

(5) The mere refusal by the Magistrate to allow the accused to cross-examine the complainant is not a ground of transfer, especially when the case has reached a very advanced stage—1917 P W R 29

(6) The fact that the Magistrate received the complaint at a late hour in the evening and issued warrant forthwith or the fact that the Magistrate recorded statements of only one of the accused persons or the fact that the complainant and the accused are both acquainted with the Magistrate who sometimes gets no local help from each is not a sufficient ground for transfer—1917 P W R 11

(7) When a case is adjourned the Court can award costs of adjournment when it is not the proper and fit thing to do and order costs against a party when it is not a proper thing to do on the part of

the Magistrate and is not a valid ground for the transfer of the case to another Magistrate—2 P. L. W. 218

(8) When the District Magistrate being asked by the Court refuses to produce the papers called for by the defence, on the ground that some are missing and others are confidential it cannot be said that the trial Court entertains any bias against the accused or that the accused should reasonably apprehend any such bias—20 Cr. L. J. 60 (PAT)

Onus of proving grounds of transfer —When an application for transfer is objected to by the accused the prosecution must bring forward the very best evidence to prove that a fair trial cannot be held in the district in which the case is ordinarily triable—6 C.M. 491

CLAUSE (b) —Since the Code allows appeals and revision applications from convictions and since the verdict of the jury is not in all cases final the High Court is loath to transfer a case to itself on the ground of any difficult question of law arising in the case. If the Lower Court errs in any point of law it can be set right afterwards by the High Court in appeal or revision. See 15 W. R. 69 (per Phear J.)

CLAUSE (d) —CONVENIENCE OF PARTIES —When all the acts constituting the offence took place in Bombay but the complainant chose to lodge his complaint in the Ratnagiri Sessions Court and the accused also wished to be tried there, the High Court ordered the trial to proceed before the Sessions Judge of Ratnagiri—5 BOM. L. R. 391. In transferring a case no consideration should be had to the fact that by the transfer to a particular district the accused will have the benefit of a trial by a jury where previously he had none. The real question is that of convenience of parties—8 C. L. J. 79. The convenience of defence witnesses when they are numerous will outweigh the convenience of the prosecution witnesses especially when they are few, and a transfer will be directed to suit the convenience of the former—Ratanlal 927

CLAUSE (e) —“*Expedient for ends of justice*” —(1) When a Magistrate who had seized of the case did not know English and there was a large amount of evidence, oral and documentary, in English, in the case, a transfer was necessary in the interests of justice—16 Cr. L. J. 73 (ALL). But the fact that the Magistrate was not well versed in Telugu and Sanskrit in which a book produced in evidence was written is not a ground of transfer, because it is a difficulty which is of common occurrence—(1911) 2 M. W. N. 50

(2) Where the case was relating to a mosque between Hindus and Momedans, it is desirable that the case should be tried by the District Magistrate or some other European Magistrate—1915 P W R 1

(3) Unnecessary delay in the disposal of a petty case is a good ground for transfer—2 Weir 679, 12 A L J 262, 8 M L T 222

(4) The fact that the accused is an acquaintance of the Magistrate, and that it would be in the interests of justice if the trial were held by a stranger Magistrate who knew nothing about either party is not a ground of transfer—16 A L J 199

CLAUSE (1)—“*I am a criminal court subordinate to its authority*”—The High Court has no jurisdiction to direct the transfer of a case from a Court not subordinate to its jurisdiction. See 18 does not empower such a transfer. Thus the High Court at Madras has no power to transfer a case from the Court of the Presidency Magistrate of Bombay to the Court of the Presidency Magistrate at Madras—10 MAD 837

The Courts of the District Magistrate and Sessions Judge of Bangalore are subordinate to the High Court of Madras and the High Court can transfer the cases pending before those Courts—9 MAD 336. The Perum Sessions Court and the Court of the Cantonment Magistrate at Secunderabad are subject to the Bombay High Court and the High Court can transfer any case pending before those Courts to any other Court of equal or superior jurisdiction—16 BOM 271, 9 BOM 331

TO WHAT COURT, CASE MAY BE TRANSFERRED.—The transfer must be from one Court to *another Court*. Therefore the High Court cannot transfer a case from the file of one Presidency Magistrate to another both being Magistrates presiding over the *same Court*—11 M L J 69. In 35 MAD 739 however the High Court transferred a case from the file of the Chief Presidency Magistrate to the file of another Presidency Magistrate.

The transfer must be to a Court of *competent* authority and of equal or superior jurisdiction. Where the High Court directed the District Magistrate to transfer a case (under Sec 107) to another Magistrate, and the District Magistrate transferred the case to a second class Magistrate the transfer was illegal because the Second Class Magistrate was not competent to hear the case under Sec 107, as he also because he was of inferior jurisdiction to the District Magistrate—77 ALL 20. The transfer should have been made to a First Class Magistrate as in 21 ALL 171

In selecting a Court to which the case is to be transferred regard must be had to the gravity of the offence. Where a case under Sec. 211 I P C was transferred from the Court of a Joint Magistrate to that of an Honorary Magistrate with first class powers, where the case remained pending for four months, it was held that the case, being of a serious nature ought to have been transferred to the Court of Session or to the Court of a more experienced Magistrate—16 A L J 294

Power of the Court to which case is transferred—See 19 ALL 249 cited under sec 192, under heading '*Transfer by High Court*'. See also 1917 P R 30

SUB SECTION (3) — A party interested—Ordinarily, the only persons who are recognised by the Code as parties to a criminal case are the persons who have the right to control the proceedings, these are the Crown, the accused and parties engaged in conducting certain proceedings within the meaning of this Code. The Code does not recognise a *private prosecutor* who is a complainant as a party to the case and he consequently is not competent to apply for a transfer as a party interested—4 P L J 656

A person alleging himself to be the complainant but who in fact is not the complainant and from whose hands the prosecution has been taken away by order of the Magistrate, is not a party interested within the meaning of this subsection—5 BOM L R 869

SUB SECTION (4) — Mode of making an application for transfer—Application for transfer should be made by motion supported by affidavit or affirmation and not by letter addressed by the Sessions Judge to the High Court—1 CAL 219 8 CAL 61 14 A W N 154 Application for transfer should not be made by the mere written statement prepared by Counsel but should be made by application supported by affidavit or by a properly verified petition—11 A W N 37

Affidavit—When the transfer is asked for on the ground that the appellant wished to call the Magistrate as a witness the application must be supported by an affidavit showing that the evidence required from the Magistrate is relevant and material—6 A W N 257

The Madras High Court holds that an application for the transfer of a criminal case by the accused is a criminal proceeding within the meaning of sec 5 of the Indian Oaths Act, and no oath can be administered to the accused. Therefore no affidavit can be put in by the accused person. If any affidavit is put in it is a nullity, and the accused cannot be convicted for any false statement contained therein—1 Weir 176 But

(2) Where the case was relating to a mosque between Hindus and Manomedans, it is desirable that the case should be tried by the District Magistrate or some other European Magistrate—1915 P W R 1

(3) Unnecessary delay in the disposal of a petty case is a good ground for transfer—2 Weir 679, 12 A L J 262, 8 M L T 222

(4) The fact that the accused is an acquaintance of the Magistrate, and that it would be in the interests of justice if the trial were held by a stranger Magistrate who knew nothing about either party is not a ground of transfer—16 A L J 490

CLAUSE (1)—“*From a criminal Court subordinate to its authority*—The High Court has no jurisdiction to direct the transfer of a case from a Court not subordinate to its jurisdiction. Sec 18 does not empower such a transfer. Thus, the High Court at Madras has no power to transfer a case from the Court of the Presidency Magistrate of Bombay to the Court of the Presidency Magistrate at Madras—40 MAD 835

The Courts of the District Magistrate and Sessions Judge of Bangalore are subordinate to the High Court of Madras and the High Court can transfer the cases pending before those Courts—9 MAD 336. The Perim Sessions Court and the Court of the Cantonment Magistrate at Secundrabad are subject to the Bombay High Court, and the High Court can transfer any case pending before those Courts to any other Court of equal or superior jurisdiction—16 BOM 274, 9 BOM 333

TO WHAT COURT, CASE MAY BE TRANSFERRED—The transfer must be from one Court to another Court. Therefore the High Court cannot transfer a case from the file of one Presidency Magistrate to another, both being Magistrates presiding over the same Court—13 M L J 69. In 35 MAD 739 however the High Court transferred a case from the file of the Chief Presidency Magistrate to the file of another Presidency Magistrate.

The transfer must be to a Court of competent authority and of equal or superior jurisdiction. Where the High Court directed the District Magistrate to transfer a case (under Sec 107) to another Magistrate, and the District Magistrate transferred the case to a second class Magistrate, the transfer was illegal, because the Second Class Magistrate was not competent to hear the case under Sec 107, and also because he was of inferior jurisdiction to the District Magistrate—37 ALL 20. The transfer should have been made to a First Class Magistrate as in 24 ALL 151.

In selecting a Court to which the case is to be transferred regard must be had to the gravity of the offence. Where a case under Sec 211 P C was transferred from the Court of a Joint Magistrate to that of an Honorary Magistrate with first class powers, where the case remained pending for four months, it was held that the case, being of a serious nature, ought to have been transferred to the Court of Session or to the Court of a more experienced Magistrate—16 A L J 294

Power of the Court to which case is transferred—See 19 ALL 249 cited under sec 192, under heading '*Transfer by High Court*'. See also 1917 P R 30

SUBSECTION (3) — *A party interested*—Ordinarily, the only persons who are recognised by the Code as parties to a criminal case are the persons who have the right to control the proceedings: these are the Crown, the accused and parties engaged in conducting certain proceedings within the meaning of this Code. The Code does not recognise a *private prosecutor* who is a complainant as a party to the case, and he consequently is not competent to apply for a transfer as a party interested—4 P L J 656

A person alleging himself to be the complainant but who in fact is not the complainant and from whose hands the prosecution has been taken away by order of the Magistrate, is not a party interested within the meaning of this subsection—5 BOM L R 869

SUBSECTION (4) — *Mode of making an application for transfer*—Application for transfer should be made by motion supported by affidavit or affirmation and not by letter addressed by the Sessions Judge to the High Court—1 CAL 219 8 CAL 61 14 A W N 154 Application for transfer should not be made by the mere written statement prepared by Counsel but should be made by application supported by affidavit or by a properly verified petition—11 A W N 37

Affidavit—When the transfer is asked for on the ground that the appellant wished to call the Magistrate as a witness the application must be supported by an affidavit showing that the evidence required from the Magistrate is relevant and material—6 A W N 257

The Madras High Court holds that an application for the transfer of a criminal case by the accused is a criminal proceeding within the meaning of sec 5 of the Indian Oaths Act, and no oath can be administered to the accused. Therefore no affidavit can be put in by the accused person. If any affidavit is put in it is a nullity, and the accused cannot be convicted for any false statement contained therein—1 Weir 176 But

in 3 LAH 16 it has been held that the affidavit is not a nullity, the provision in section 342 (4) that no oath can be administered to an accused has reference only to the statement made by him during his examination under that section it does not preclude him from making an affidavit in support of his application under sec 526

Counter-affidavit by District Magistrate —When an application for transfer is made on the ground of partiality of the Magistrate before whom the case was pending, it is highly improper for the District Magistrate to make an affidavit swearing as to the impartiality of that Magistrate—25 BOM 179

SUB-SECTION (5) —COSTS —When the case is transferred at the instance of the accused he will be ordered to pay all the complainant's costs incurred before the Magistrate from whose file the transfer was ordered—8 C W N 589 In 8 C W N 75 the Crown bore all the expenses of the complainant's witnesses

SUB SECTION (6A) —“ We have found section 526 somewhat difficult to deal with One class of opinions presses for greater safeguards against frivolous, vexatious or dilatory applications for transfer Another class deprecates any measures which makes a transfer more difficult to obtain We think it is unavoidable to retain in the Code some provision for the compulsory adjournment of a case when an intention to apply for a transfer has been notified But we recognise that the provisions of the section, as they stand, have lent themselves to gross abuse, and, therefore, we feel that greater safeguards are necessary For these reasons in the first place, we maintain the principle of the new-sub section (6 A) which enables the High Court to award costs in dismissing an application We have however, modified it to this extent, that it will enable the High Court in cases where it is of opinion that the application was frivolous or vexatious to award such amount by way of reasonable costs in the High Court and the Court below as it thinks fit ”—*Report of the Joint Committee (1922)*

SUB-SECTION (8) —Under the old section, an application for adjournment had to be made before the commencement of the hearing—29 CAL 211, 8 C W N 77, and therefore an application for adjournment made after the charge had been read and explained to the accused was not an application made ‘ before the commencement of the hearing ’ and could not therefore be granted—35 MAD 701 The present section lays down that in case of an inquiry or trial the application may be made at any time during its course, whereas in case of appeal the application must be made before the commencement of the hearing

Court, whether and how adjourn—Under the old section there was a difference of opinion as to whether the Court was bound to adjourn the trial on an application for adjournment. In 15 CAL 475 8 C W N 77, 2 Weir 685 33 CAL 1183 and 18 L R 35 it was held that the words of this section were obligatory and the Court was bound to adjourn. But in 19 MAD 375 6 C W N 717 18 A L J 1145 and 31 CAL 715 it was held that the Court was not bound to grant an adjournment if there was sufficient time between the date of the application for adjournment and the date fixed for the hearing of the case, to have moved the High Court for transfer and to have obtained its orders thereon.

The words of the present sub-section have been made more imperative by omitting certain words which occurred at end of the old sub-section and which took away the force of the word "shall". The *Joint Committee* remarks: "Our amendment provides for a compulsory adjournment at any stage of the case except that a Sessions Court may refuse to adjourn (sub-section 9) when it is of opinion that the application has been unreasonably delayed."

The postponement should be for a reasonable time to allow the party to move the High Court for transfer. A postponement for too short a time is useless—19 MAD 375. An adjournment for six days is not a reasonable time to allow which to move the High Court—2 Weir 686.

Magistrate proceed with the case after issue of rule for transfer

—When an application was made under this sub-section and the Magistrate without passing any orders thereon proceeded with the case, and even though a telegram to the effect that a rule nisi by the High Court staying proceedings has been issued was shown to the Magistrate, he examined some more witnesses for the prosecution and committed the accused. It was held that the action on the part of the Magistrate was enough to show a bias and consequently a transfer was necessary—14 C W N 507 3 C W N 110 2 C W N 498 16 C W N 1031. If the Court entertains any doubt about the truth of the telegram it should have satisfied itself by telegraphing to the Registrar of the High Court—3 C W N 119 2 C W N 498. Where upon the High Court having issued a rule staying further proceedings the petitioner sent a telegram which was laid before the trying Magistrate, but the petitioner having failed to appear on the date previously fixed, the Magistrate issued a warrant upon the petitioner. It was held that the sending of the telegram did not in any way absolve the obligation of the petitioner to appear before the Court on the date fixed and

the issue of the warrant upon the petitioner was no ground for transfer of the case—17 C W N 536

Where the High Court granted a transfer on the 26th and on the 27th a telegram to that effect was shown to the Magistrate and the Magistrate adjourned proceedings till the 30th so that the order of the High Court might reach him, and on the 30th the Magistrate proceeded with the case and convicted the accused and on the 31st the order of the High Court reached the Magistrate it was held that the Magistrate's action though not illegal was indiscreet in as much as he did not wait sufficiently for the order of the High Court to reach him—Ratanlal 46

SUB SECTION (9) —Under this sub-section the Sessions Court may refuse to adjourn when it is of opinion that the application has been unreasonably delayed. The reason is that "the calendars of Sessions Courts involving the convenience of jurors assessors and parties are peculiarly liable to be upset by the postponement of cases —*Statement of Object and Reasons (1914)*

526-A. (1) *Where any person subject to the Naval Discipline Act or to the Army Act or for trial to itself to the Air Force Act is accused of any offence such as is referred to in proviso (a) to section 41 of the Army Act the Advocate General shall if so instructed by the competent authority, apply to the High Court for the committal or transfer of the case to that High Court and thereupon the High Court shall order that the case be committed for trial to or be transferred to itself and shall thereafter proceed to try the case by jury*

(2) *The Governor General in Council may by notification in the Gazette of India declare any officer to be the competent authority for the purpose of issuing instructions under sub-section (1) in regard to any class of case specified in the notification*

This section has been added by the Criminal Law Amendment Act 1923

527. (1) *The Governor-General in Council may by notification in the Gazette of India direct the transfer of any particular case or appeal from one High Court to another High Court or from any Criminal Court subordinate to one High Court to any*

Power of Governor General in Council to transfer criminal cases and appeals

other Criminal Court of equal or superior jurisdiction subordinate to another High Court, whenever it appears to him that such transfer will promote the ends of justice, or tend to the general convenience of parties or witnesses.

(2) The Court to which such case on appeal is transferred shall deal with the same as if it had been originally instituted in or presented to, such Court.

The word 'criminal' has now been omitted from this section.

528. (1) *Any Sessions Judge may withdraw any case from any Assistant Sessions Judge subordinate to him from or recall any case which he has made over to any Assistant Sessions Judge subordinate to him.*

(2) *Any Chief Presidency Magistrate, District Magistrate or Sub-divisional Magistrate may withdraw or refer any case which he has made over to any Magistrate subordinate to him, and may inquire into or try such case himself or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same.*

(3) *The Local Government may authorize the District Magistrate to withdraw from any Magistrate subordinate to him either such classes of cases as he thinks proper or particular classes of cases.*

(4) *Any Magistrate may recall any case made over by him under S. 192 sub-S. (2) to any other Magistrate and may inquire into or try such case himself.*

(5) *A Magistrate making an order under this section shall record in writing his reasons for making the same.*

(6) *The head of a Village under the Madras Village-police Regulation 1816 or the Malabar Village-police Regulation 1821 is a Magistrate for the purposes of this section.*

CHANGE.—Sub-sections (1) and (4) have been newly added, and sub-section (6) has been slightly amended.

SUBSECTION (1).—'In order to facilitate arrangements for the disposal of sessions business it is proposed to empower Sessions Judges to withdraw or recall cases from the files of Assistant Sessions Judges

This question does not arise in the case of appeals as they are heard by Sessions or Additional Sessions Judges." *Statement of Objects and Reasons* (1921)

SUB-SECTION (2)—District Magistrate and Subdivisional Magistrate—Under this section, the District Magistrate and the subdivisional Magistrate within his sub-division has co ordinate jurisdiction. The District Magistrate cannot set aside a transfer made by the Sub-divisional Magistrate, for that would be virtually entertaining an appeal against an order of the subdivisional Magistrate passed under this section. He can take action under sec 435 or 438, or can withdraw the case to his file and transfer it to some other Magistrate—2 BOM 519, 26 MAD 130. Magistrates of co ordinate jurisdiction should not interfere with each other's jurisdiction. Where a Magistrate acts on his own initiative in transferring a Criminal case, his order is not vitiated by the fact that that another Magistrate of co ordinate authority has refused it. But if he examines the reasons given by the latter and finds them to be wrong, that is interfering by way of appeal and the new order passed by such Magistrate is not sustainable in law—5 L. W. 372. But in 11 MAD 399 it has been held that a Magistrate subordinate to the subdivisional Magistrate is also subordinate to the District Magistrate within the meaning of this section, and the District Magistrate can interfere with an order of transfer made by the subdivisional Magistrate.

Chief Presidency Magistrate—The Chief Presidency Magistrate has under this section power to withdraw any case from one of the junior Presidency Magistrates and refer it for enquiry or trial to any other Magistrate—1 BOM L. R. 387.

CASES WHICH CAN BE TRANSFERRED—This section is applicable to (1) proceedings under Chapter VIII—8 CAL 851, (2) proceedings under Chapter XII—22 CAL 898, 2 C L J 611, 5 C W. N 686, 2 P L T 186 and to (3) proceedings under sec 488—1905 P. R. 5.

The term "case" includes a proceeding upon a complaint as soon as the complaint has been received by the Magistrate who takes cognizance of the offence complained of. A case can be transferred even before the Magistrate decides to issue process against the accused—7 N. L. R. 97.

CASE WHEN CAN BE TRANSFERRED—(1) A case may be transferred as soon as the complaint is filed and the Magistrate takes cognizance of the case and before he issues process. A person who

apprehends that a complaint made against him will not be impartially tried by the Magistrate is entitled to have the case transferred even before issue of any process against him—7 N L R 97 But when a complaint has been dismissed by a Magistrate under Sec. 201 and the Sessions Judge has directed further inquiry into the case, the District Magistrate cannot transfer the case from the file of that Magistrate to any other Magistrate—11 C W N 316 (2) A case cannot be transferred at a very late stage of the trial, when the prosecution evidence has been taken and all that remains to be done is to pass an order of commitment or discharge—2 Weir 691 (3) A District Magistrate ought not to transfer a case pending before a subordinate Magistrate after the whole of the prosecution evidence has been taken and the Magistrate has expressed an opinion that the evidence for the prosecution is not sufficient to support the charge—11 W R 12 (4) A case which has been disposed of by a competent authority, cannot be withdrawn by the District Magistrate to his file under this section—17 C W N 451 But where several persons were charged before the police with rioting and only one of them was sent up by the police for trial and was convicted, whereupon the complainant asked the Magistrate to issue process against the other persons but the Magistrate refused, and the District Magistrate thereupon withdrew the case to his own file, it was held that the District Magistrate had ample jurisdiction to do so, the refusal of the subordinate Magistrate to issue process against the other accused did not dispose of the case finally, but the case was still pending before the subordinate Magistrate—5 C W N 488 (5) Where the records of a case have been sent to a Head Assistant Magistrate under Sec. 319 for enhancement of punishment the case can be validly transferred at that stage by the District Magistrate to a Joint Magistrate—2 Weir 690

To whom cases may be transferred—The District Magistrate after withdrawing a case can refer it to any subordinate Magistrate. An Additional District Magistrate is now subordinate to the District Magistrate under the express provision of Section 10 (3) and the latter can transfer cases to the former. The contrary ruling in 31 CAL 918 is no longer good law. When a Magistrate is gazetted to the office of the Chairman of the Municipal Board and takes charge of that office, he is thereby divested of his office as *Magistrate*. He ceases to be subordinate to the District Magistrate and the latter cannot transfer any Criminal case to him for trial—36 ALL 513 Moreover, the case must be transferred to a Magistrate competent to try the case. A District

Magistrate cannot transfer a case under Sec 107 to a second class Magistrate—37 ALL 20 or to a Magistrate who has no local jurisdiction over the matter—11 MAD 246

GROUND'S OF TRANSFER —The District Magistrate's powers under this section are very wide and undefined, and he should exercise the powers with due discretion and for really good reasons —1899 P R 13, 20 Cr. L J 402

When personal allegations are made against a Magistrate as grounds of transfer, the District Magistrate must require strict proof of the allegations —Ratanlal 590 To move a case from one Magistrate to another on grounds personal to such Magistrate is tantamount to a severe censure on such officer and the very clearest grounds must exist before a transfer can be allowed —6 B H C R 69, and moreover the Magistrate must be given an opportunity of answering the allegations made against him by the applicant —5 BOM L R 28

Where a Magistrate in the course of an investigation held a prolonged inquiry during which he made a number of notes, and collected a huge amount of information which by reason of the way in which it was acquired he could not properly or legally consider in arriving at a judicial determination, and the notes made by the Magistrate were of such a nature that he ought to be examined as a witness in respect thereto, it was held that in such a case the Magistrate ought not to try the case, but that it must be transferred to some other Magistrate —21 CAL 920, 20 W R 76 The fact that a Magistrate before whom a case is pending is also the Treasury officer and has very little time at his disposal by virtue of his duties as a Treasury officer is not a sufficient ground for directing a transfer of a case from his Court —20 Cr L J 402 (PAT) Where a Magistrate tried and convicted an accused in a case and expressed opinion that the evidence of the accused was not believable, it was held that the expressed opinion in itself was no ground for a transfer of another case against the same accused by a different complainant under a different set of facts —4 P L W 21 The fact that the trial of a case before a Magistrate extended for a long time (e g 3 months) is not a vital ground for withdrawing the case from the file of the Magistrate —19 Cr L J 119 (PAT)

Recording reasons —It is highly inexpedient to transfer a case from one Magistrate to another without recording reasons —Ratanlal 590 An order of transfer of a criminal case even for the ends of justice must be for recorded reasons —16 Cr L J 626 (MAD), but a failure to record reasons will not vitiate the proceedings unless it has

prejudiced the accused—4 CAL 918 Where by virtue of a Government order the District Magistrate had been directed to withdraw all cases in which complaints had been made against a police officer, the omission to record reasons therefor was a mere irregularity and did not vitiate the subsequent proceedings—28 ALL 421

NOTICE.—An order of transfer ought not to be made *ex parte* i. e., on the allegations of the complainant or accused only and without giving notice to the opposite party—Ratanlal 460 Ratanlal 471, Ratanlal 655 Ratanlal 877, 21 BOM L R 276, 39 M L J 714 Where a case is transferred to another Magistrate notice of transfer should be given to the complainant as well as to the accused—3 ALL 749 8 CAL 391 7 C W N 114 22 BOM 549 1902 P R 28 14 C P L R 190 U B R (1897—1901) 392 Although the section does not provide for the giving of a notice to the opposite party still on general principle notice should be given to the party affected before an order for transfer is made—7 C W N 114 Where a transfer is made at a late stage of the trial *e. g.* when all the prosecution witnesses have been examined the Magistrate does not exercise a sound discretion in not giving notice to the accused—6 M L T 14 7 A W N 53 Ratanlal 990 Where at the instance of the complainant a Subdivisional Magistrate after hearing the parties has transferred a case from the file of one Sub Magistrate to that of another it is not open to the District Magistrate to re-transfer the case at the instance of the accused without notice to the complainant—39 M L J 711

But want of notice does not amount to illegality but to impropriety. The question of propriety is one to be decided on the facts of each case—21 BOM L R 276 If the opposite party acquiesces in the transfer he cannot complain on the ground of absence of notice—7 A W N 97 When the District Magistrate transferred a case *ex parte* on administrative grounds no notice was held necessary—1910 P R 3 When the order of the transfer was made at the request of the trying Magistrate no notice need be given to either party—24 MAD 317 Where there was great delay in disposing of a petty case an order of transfer could be made without notice to the accused to show cause against the order—2 Weir 122 When by virtue of a Government order the District Magistrate was directed to withdraw all cases in which complaints had been made against police officers no notice to the complainant was necessary before making a transfer—28 ALL 421

POWER OF DISTRICT MAGISTRATE AFTER TRANSFER.—The District Magistrate after having transferred the case to a subordi-

mate Magistrate has no jurisdiction relating to the case, so long as the transfer subsists. But he can again withdraw the case to his own file if he thinks fit—12 W R 53. When a District Magistrate makes an order of transfer, the case is out of his hands and the District Magistrate has no jurisdiction to make any order in the case when it is properly seized of by a subordinate Magistrate—32 CAL 783. He cannot dismiss the complaint, much less prosecute the complainant—3 C W N 490, nor can he issue process for the apprehension of the absconding accused—27 CAL 979. He can make no order in the case except such order as may be made by him by way of revision—30 CAL 449.

Powers and duties of Magistrate to whom case is transferred -- When a case has been transferred after process has been issued to the accused, the Magistrate to whom the case has been transferred should proceed from the stage in which the proceedings were left. He cannot go back and dismiss the complaint under sec 203—19 W R 28.

The Magistrate to whom a case is transferred can act upon the evidence already recorded by the Magistrate from whom the case is withdrawn. See notes under sub section (3) of sec 350.

The Magistrate to whom a case is transferred cannot further transfer the case to some other Magistrate subordinate to him—36 ALL 166, 12 A L J 277.

SUBSECTION (6) —This subsection supercedes 15 MAD 19 (decided under the 1882 Code) in which it was held that the village Headman not being a Magistrate no case from his file could be transferred to the file of another Magistrate.

Prior to its present amendment this subsection applied only to village Headmen appointed under Madras Regulation IV of 1821 and therefore a District Magistrate was not competent to transfer a case from a village Headman appointed under *any other* Regulation (*e g* Reg VI of 1816)—26 MAD 394. This case is now overruled as the present subsection expressly mentions the Regulation of 1816.

CHAPTER XLIV-A

SUPPLEMENTARY PROVISIONS RELATING TO EUROPEAN AND INDIAN BRITISH SUBJECTS AND OTHERS

528-A. (1) *If here, in any case to which the provisions of Chapter XVIII do not apply, any person claims to be dealt with as an*

Indian British subject or as European or American *European or Indian British subject, or where any person claims to be dealt with as an European (other than an European British subject) or an American he shall state the grounds of such claim to the Magistrate before whom he is brought for the purpose of the inquiry or trial and such Magistrate shall inquire into the truth of such statement and allow the person making it a reasonable time within which to prove that it is true, and shall then decide whether he is or is not an European British subject or an Indian British subject, or an European or an American, as the case may be and shall deal with him accordingly*

(2) *When any such claim is rejected by the Magistrate and the person by whom it was made is committed by the Magistrate for trial before the Court of Session, and such person repeats the claim before such Court, such Court shall, after such further inquiry if any, as it thinks fit, decide the claim, and shall deal with such person accordingly*

(3) *When any Court before which any person is tried rejects any such claim as aforesaid the decision shall form a ground of appeal from the sentence or order passed in such trial*

This is the old section 453 with necessary alterations

Claims as to status — Evidence — The plea that the accused is an European British subject must be substantiated by ample evidence. Where the prisoner pleaded that he was a European British subject but the evidence as to his nationality was incomplete it was held that the plea was not made out—6 M H C R ~ So also a mere statement by the prisoner that he is an European British subject cannot be acted upon—5 W R 53 The Judge may be satisfied by the appearance of the prisoner and the circumstances brought forward at the time that the plea is true but if he is not so satisfied and the plea is persisted in it must be substantiated by sufficient evidence—6 M H C R 7

Opportunity to plead must be given — The Magistrate trying the prisoner ought to give him an opportunity of pleading that he is an European British subject—5 W R 53

528-B. *If in any such case an European or Indian*

Failure to plead British subject or an European (other than an European British subject) or an American does not claim to be dealt with as such by the

Magistrate before whom he is tried or by whom he is committed, or if, when such claim has been made before and rejected by the committing Magistrate, it is not repeated before the Court to which such person is committed, he shall be held to have relinquished his right to be dealt with as an European British subject or an Indian British subject, or an European or an American, as the case may be and shall not assert it in any subsequent stage of the case

This is the old section 454 with necessary alterations

Waiver —An European British Subject can relinquish his right. The provisions of this Code give certain rights and privileges to the European British Subjects which rights they are at liberty to give up—6 CAL 83 Failure to make a claim amounts to a relinquishment of rights—1912 P R 6 Where the Magistrate explained to the accused his rights under this Code and then asked him if he claimed to be dealt with as such and the accused stated he did not claim the rights it was held that he had relinquished the rights—*Barindra Kumar Ghosh*, 37 CAL 467

Magistrate whether bound to inform accused of his rights —The Calcutta High Court holds that before a European British subject can be considered to have waived his privileges upon him by this Code it must appear that his rights were distinctly made known to him to enable him to exercise his choice and judgment whether he would or would not claim those rights—6 CAL 83 Where this was not done the conviction was set aside—18 C W N 385 and the records were returned to the Magistrate with a direction that he should explain to the accused all the privileges he is entitled to as an European British subject and definitely ascertain from him whether he waives his claims—7 N L R 93 But the Punjab Chief Court holds that it is not the duty of the Magistrate to ask categorically whether the accused claims his right as an European British Subject much less his duty to explain his right to him as such subject. The Legislature appears to presume that a person entitled to a privilege knows of its existence and that if he desires to assert it he will assert it—1885 P R 5

Revocation of waiver —The waiver is not irrevocable. If the withdrawal of the waiver is made promptly and shortly after the waiver had been made and if substantially nothing had been done in the interval on the waiver, the withdrawal should be allowed—1908 P R 1, 1878 P R 17.

528-C. *If here a person, not being an European British subject, is dealt with as an European*
Trial of person as subject, is dealt with as an European
belonging to class to British subject or, not being an Indian
which he does not be- British subject, is dealt with as an
long Indian British subject or, not being an European (other than
an European British subject) or American, is dealt with as
an European or American, and such person does not object,
the inquiry, commitment, trial, or sentence, as the case may
be, shall not, by reason of such dealing, be invalid.

This is the old section 455 with certain alterations

528-D. (1) *Unless there is something repugnant in the*
Application of Acts Context, all enactments made by the Go-
confering jurisdiction vernor-General in Council or the Indian
on Magistrates or Legislature which confer on Magistrates
Courts of Session or on the Court of Session jurisdiction over offences shall be
deemed to apply to European British subjects, although such
persons are not expressly referred to therein

(2) *Nothing in this section shall be deemed to authorize*
any Court to exceed the limits prescribed by this Code as to
the amount of punishment which it may inflict on an Euro-
pean British subject or to confer jurisdiction on any Magis-
trate of the second or third class for the trial of such subjects.

This is the old section 459 with certain alterations

CHAPTER XLV
OF IRREGULAR PROCEEDINGS

529. *If any Magistrate not em-*
Irregularities which powered by law to do any of the
do not vitiate proceed following things, namely —
ings

- (a) to issue a search-warrant under section 98,
- (b) to order under section 155, the police to investi-
gate an offence,
- (c) to hold an inquest under section 176;
- (d) to issue process under section 186 for the apprehen-
sion of a person within the local limits of his juris-
diction who has committed an offence outside such
limits;
- (e) to take cognizance of an offence under section 190,
sub-section (1) clause (a) or clause (b);
- (f) to transfer a case under section 192;

- (g) to tender a pardon under section 337 or section 338,
- (h) to sell property under section 524 or section 525, or
- (i) to withdraw a case and try it himself under section 528,

erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered

Clause (f) — 'A case' includes cases under Chapter VIII or XII. See notes under Sec 192. The irregularity of transfer under Sec 192 by a Magistrate not empowered is cured by this section—36 CAL 869, 36 CAL 370

Clause (g) —Sec 20 ALL 40 cited under Sec 337

Prejudice to accused —Having regard to the provisions of this section read with Sec 531, it must be shown that proceedings wrongly held in a case has in fact occasioned a failure of justice before they can be set aside—39 CAL 119

530. If any Magistrate, not being empowered by law to do any of the following things, namely —

- (a) attaches and sells property under section 88,
- (b) issues a search-warrant for a letter, parcel or other thing in the Post Office, or a telegram in the Telegraph Department,
- (c) demands security to keep the peace,
- (d) demands security for good behaviour,
- (e) discharges a person lawfully bound to be of good behaviour,
- (f) cancels a bond to keep the peace,
- (g) makes an order under section 133 as to a local nuisance,
- (h) prohibits, under section 143, the repetition or continuance of a public nuisance,
- (i) issues an order under section 144,
- (j) makes an order under Chapter XII;
- (l) takes cognizance, under section 190, sub-section (1) clause (c), of an offence,
- (l) passes a sentence under section 349, on proceedings recorded by another Magistrate,
- (m) calls, under section 435, for proceedings,
- (n) makes an order for maintenance,

- (o) revises, under S 515, an order passed under S 514,
- (p) tries an offender,
- (q) tries an offender summarily, or
- (r) decides an appeal,

his proceedings shall be void

Clause (j) —This clause refers only to a case where a Magistrate is not competent by virtue of the position he holds or powers vested in him to try a case of the character mentioned in Sec 145. But where a Magistrate is competent to try a case under Sec 145 the fact that he has not local jurisdiction over the matter will not make the trial void—5 C W N 686

Clause (p) —If a Third Class Magistrate not being specially empowered by the Local Government tries an offender under sec 2 of the Bombay Public Conveyances Act (IV of 1863) the trial is void—Ratanlal 921. If a Second Class Magistrate tries an accused who has actually committed an offence under sec 409 I P C as though for an offence under sec 406 I P C the trial and conviction are void—1 BOM L R 27. But where the offence consists of circumstances of aggravation which make it triable by a higher Court and a 2nd Class Magistrate tries it, ignoring the aggravating circumstances the proceedings are not void *ab initio* under this section—13 BOM 502. See also 4 BOM L R 267 and 21 MAD 675.

Where a trial is void under this section sec 403 does not bar a retrial—8 BOM 307 1910 P R 7 29 CAL 412

Clause (q) —Where a Magistrate deliberately disregards the offence actually complained of viz an offence not triable summarily and tries it summarily his proceedings are absolutely void—5 C W N 232 29 CAL 409 1907 P I R 21 4 CAL 18

531. No finding, sentence or order of any Criminal

Proceedings in wrong Court shall be set aside merely on the place ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed, took place in a wrong sessions division, district, sub division or other local area, unless it appears that such error has in fact occasioned a failure of justice

OBJECT OF SECS 531-38 —The policy of the Criminal Procedure Code as shown by secs 531-538 is to uphold in most cases orders passed by a Criminal Court which was lacking in local jurisdiction or which had committed illegalities or irregularities, unless failure of justice has

been occasioned, or is likely to be occasioned through such want of jurisdiction or such illegalities or irregularities—42 MAD 791

SCOPE OF SECTION —This section only refers to districts subdivisions and local areas *governed by this Code*, and not to tributary Mahals like Keonjhar or Mourbhany to which the Code does not extend—15 CAL 667, 8 CAL 985

Offence in one place, trial or commitment in another —See notes under section 177, under heading “Local Limits” See also 17 MAD 102

Commitment to wrong Sessions —See notes under sec 177

Trial at a place outside jurisdiction —Where a Criminal appeal was presented to a Sessions Judge at a place within his jurisdiction but was heard and disposed of at a place which was outside the local limits of his criminal jurisdiction, but where he had *civil* jurisdiction, it was held that the procedure was an irregularity, but no failure of justice being occasioned thereby, the trial was not a nullity—17 ALL 36

Jurisdiction of Court to order forfeiture —This section applies only to proceedings in a wrong place and cures defects as to local jurisdiction. But it cannot cure a defect where a bond of appearance taken from the accused by one Magistrate is forfeited by another Magistrate, for it is a defect not of *local* jurisdiction but of *personal* jurisdiction—16 BOM L R 84 (cited under sec 514)

Failure of justice —Where no objection was taken in the Lower Court, and the petitioner failed to show in the High Court that he had been prejudiced the High Court declined to interfere—21 W R 85. Even the fact that the objection of jurisdiction was taken at a comparatively early stage of the proceeding was not a conclusive proof that the accused was prejudiced by the irregularity—34 C L J 200

532. (1) If any Magistrate or other authority purport-

When irregular committing to exercise powers duly conferred, commitments may be valid which were not so conferred, commitments dated

an accused person for trial before a Court of Session or High Court, the Court to which the commitment is made may, after perusal of the proceedings, accept the commitment if it considers that the accused has not been injured thereby, unless during the inquiry and before the order of commitment, objection was made on behalf either of the accused or of the prosecution to the jurisdiction of such Magistrate or other authority

(2) If such Court considers that the accused was injured, or if such objection was so made, it shall quash the commitment and direct a fresh inquiry by a competent Magistrate.

SECS. 531 AND 532.—Sec. 531 must be read as complete in itself and not as in any way cut down or limited by the proviso contained in the latter part of sec. 532. Sec. 531 applies only to cases in which there is no jurisdiction by reason of the inquiry, trial or other proceeding being in the wrong local area. Sec. 532 seems to refer to cases in which the Magistrate is competent to deal with the offence as having taken place within the local limits of his jurisdiction but has no power to commit to the Sessions either because he is a Second Class Magistrate or for some reason other than that of local jurisdiction—16 BOM. 200.

SCOPE OF SECTION.—This section applies only to cases where the Magistrate or other authority who has assumed to commit has not been duly invested with the powers under which he assumed to make the commitment i.e. when the defect is one personal to the committing authority and not a defect in his proceeding—1890 P. R. 16. This section does not deal with cases in which the defect in the committed order arises from want of territorial jurisdiction—16 BOM. 200. 20 Cr. L. 1 416 (MAD). This section does not apply where the commitment is bad owing to a disqualification of the Magistrate under sec. 55C—2 L. B. R. 249. It has no application to commitments made by Magistrates acting under sec. 316—12 C. W. N. 756. But this section applies where the commitment is irregular by reason of want of sanction under sec. 196 or 197—22 BOM. 112. 9 BOM. 288.

OBJECTION TO COMMITMENT.—If the commitment is valid under sec. 531 it cannot be set aside under this section although the objection to such commitment was taken before the commitment—17 MAD. 402.

Where objection to the want of jurisdiction of the Magistrate to commit is not taken before the Magistrate the High Court can accept the commitment under this section if it considers that the accused has not been prejudiced thereby—22 BOM. 112.

533. (1) If any Court before which a confession or other statement of an accused person Non compliance with provisions of S. 164 or 364 recorded or purporting to be recorded under S. 164 or S. 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that

such person duly made the statement recorded; and, notwithstanding anything contained in the Indian Evidence Act, 1872, S 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits.

(2) The provisions of this section apply to Courts of Appeal, Reference and Revision.

SCOPE OF SECTION—What this section means is this that where a confession or other statement of an accused person is duly made, but in recording it, the provisions of the law have not been complied with, oral evidence is admissible to prove that the confession or the statement was duly made. The defect which the section intends to cure is one not of substance, but of form only, as for instance when the Magistrate has omitted to sign the certificate, or has omitted to state in the certificate that the statement was taken in his hearing—2 C W N 702, 1915 P R 17. But this section will not render a confession admissible when the provisions of the law have been totally disregarded—9 MAD 224, 17 CAL 862. But in 23 BOM 221 and 21 BOM 495 it has been held that this section applies to omissions to comply with the law as well as to infractions of the law, i.e. to defects not only of form but of substance also.

Irregularity in record of confession—See notes under secs 164,

Omission to sign the record—See notes under sec 364 under heading “Record must be signed”

Want of certificate—See notes under secs 164 and 364.

Omission to give warning to accused—See notes under sec 164

534. *An omission to inform under S 447 any person of his rights under Chapter XXXIII shall not affect the validity of any proceeding.*

This section has been amended by the Criminal Law Amendment Act, 1923

535. (1) No finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed, unless, in the opinion of the Court of appeal or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal or revision thinks that a failure of justice has been occasioned by an omission to frame a charge, it shall order that a charge be framed, and that the

trial be recommenced from the point immediately after the framing of the charge

An omission to frame a charge does not invalidate an order of acquittal and render it equivalent to an order of discharge, such order is a bar to a retrial for the same offence—3 ALL 129

Where a charge has been framed under sec 147, I P C but the accused was convicted of an offence under sec 323 I P C it was held that the conviction was illegal on account of the absence of a charge under sec 323 I P C and sec 535 of this Code will not cure the defect. The words 'merely on the ground that no charge was framed' in this section must mean a case where the offence being a petty one, and the evidence being fairly taken, the Court framed no charge at all. But where a charge *has been framed* (in this case a charge under Sec 147 I P C was framed) it cannot be said that the conviction shall not be deemed invalid merely on the ground that no charge was framed—40 CAL 168

Where a Magistrate framed a charge under section 19 (c) and (t) of the Arms Act and then submitted the record to the District Magistrate for his sanction and the District Magistrate sanctioned the institution of proceedings, whereupon the trial proceeded and the accused was convicted it was held that the omission to frame a charge afresh after sanction is cured by this section—4 L B R 247

536. (1) If an offence triable with the aid of assessors Trial by jury of is tried by a jury, the trial shall not on offence triable with that ground only be invalid assessors

(2) If an offence triable by a jury is tried with the aid Trial with assessors of assessors the trial shall not on that offence triable by jury ground only be invalid, unless the objection is taken before the Court records its finding

SUBSECTION (1) —The difference between a trial by jury and a trial by assessors lies in the summing up in the case of the former, and the manner in which the verdict of the former and the opinion of the latter are taken. It is at this latter point that there is a departure of ways and if the accused does not put any objection at the crucial point he cannot afterwards be heard to complain. Where no objection was taken at the trial it was too late to take objection on appeal—33 BOM 421

SUBSECTION (2) —Where a case was triable by jury but was tried with the aid of assessors and no objection was taken at the trial it was held that the trial was not invalid even though the accused

was materially injured in as much as the Judge differed from the opinion of the assessors and convicted the accused—23 MAD 632
The objection must be taken at the trial and cannot be taken in appeal—*Ibid*

537. Subject to the provisions hereinafore contained,

Finding or sentence no finding, sentence or order passed by when reversible by reason of error or omission in charge or proceedings a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account—

(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code, or

(b) *Omitted*

(c) of the omission to revise any list of jurors or assessors in accordance with S 324, or

(d) of any misdirection in any charge to a jury unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice

Explanation—In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings

CHANGE—Clause (b) which referred to want of sanction under section 195 and to irregularity in proceedings under sec 476 has been omitted. In the old section there was an illustration—“A Magistrate being required by law to sign a document signs it in initials only. This is purely an irregularity and does not affect the validity of the proceeding.” This illustration has been omitted because it is inappropriate (*Report of the Select Committee of 1916*)

SCOPE OF SECTION—This section applies to mere errors of procedure arising out of mere inadvertence and not to substantive errors of law—8 BOM 200, 11 B H C R 237, 12 W R (P C) 32. When a trial is contrary to law it is no trial at all and disobedience to an express provision of law as to the mode of the trial is not an irregularity which can be cured by this section but is an illegality which vitiates the whole trial. This section has not the effect of curing

material irregularities and absolute illegalities. The errors which can be cured by this section are formal defects of procedure and not substantive errors of law—25 MAD 61 (P C), 5 P L J 61. The test to be applied in considering whether a particular infringement of the provisions of the Code does or does not fall within the purview of section 537 appears to be this. Does the error go to the whole root of the trial? Does it in effect vitiate the proceedings? Has the Court assumed an authority which it does not possess? Has it broken the vital rules of procedure? If the error is of such a nature that the proceedings are vitiated in their very inception section 537 has no application but the mere fact that a certain provision of the Code is imperative does not in itself indicate that a breach of the provision vitiates the whole proceeding—20 A J. 3 874.

Subject to provisions heretofore contained.—These words do not refer to the provisions of the entire Code preceding this section, but only to the provisions of this chapter (*i.e.* secs. 529 to 536)—19 C W N 972 (per Sharfuddin and Beacheroff JJ) *contra*—22 CAL 176, 23 Cal 983 19 C W N 972 (per Fletcher J).

Court of competent jurisdiction.—This means a Court of competent jurisdiction in respect of the particular offence charged—10 BOM 319. If a Magistrate in consequence of personal disqualification (*e.g.* under section 556) is forbidden by law to try a particular case, though he may be authorised generally to try cases of the same class, he cannot be said to be a Court of competent jurisdiction with respect to that particular case—23 CAL 328. Thus a Magistrate who takes cognizance of a case under sec. 190 (1) (c) is not competent to try the case if the accused objects to it and if in spite of such objection he proceeds to try the same himself he cannot be said to be a Court of competent jurisdiction in respect of that case—13 ALL 315. If a District Magistrate transfers to a subordinate Magistrate a case which the latter is not competent to try a trial by the latter of that case is a defect which cannot be cured by this section as the trial is not held by a Court of competent jurisdiction—23 CAL 442.

FAILURE OF JUSTICE.—The test in case of errors omissions or irregularities and other matters of like nature referred to in this section is not whether the Court had acted illegally (for in one sense every error or irregularity in so far as it contravenes the provisions of the Code is illegal) but whether there had been a failure of justice—27 CAL 839. Moreover the test whether the error or irregularity has occasioned a failure of justice can be properly applied only after the

final result of the case is known. Where an objection is taken on the ground of there being a material error, before a case is finally disposed of, and while there is time to correct the same it would be unreasonable to hold that the section intends the error to be allowed to remain uncorrected. To hold that would be to give this section the effect not only of curing mere formal defects of procedure when discovered too late, but of practically subverting all procedure—23 CAL 983. If however the inquiry has proceeded far enough to enable the test required by this section to be applied this section may be called in to cure the error or irregularity—12 Cr L J 320 (Sind.)

'In fact' —The words 'in fact' have been introduced into the Code of 1898 apparently in order to emphasize the duty of the Court to go into the merits before interfering in consequence of a misdirection or other error—26 MAD 1.

Error in Complaint —See notes under section 200.

Error or irregularity in summons or warrant —See 8 ALL 293 under sec 65, 38 MAD 1088 and 18 A L J 1149 under sec 90 1917 W W N 491 and 1916 P W R 12 under sec 96, and notes under sec 115. The error of a Magistrate in proceeding by warrant instead of by summons, furnishes no ground for quashing the proceedings—1 W L 16.

A search warrant issued illegally under section 96 (1) cannot by the operation of this section be taken to have been validly issued under sec 98. This section cannot give legal effect to a defective warrant—35 CAL 1076.

Issue of fresh summons —Where on an information a summons was issued to the accused and owing to its disclosing no offence a fresh summons was issued without any fresh or supplemental information the error omission or irregularity in the fresh summons is not sufficient to upset the finding and sentence unless it has occasioned a failure of justice—31 BOM 611.

Irregularity in arrest —Where certain arrests were made without the substance of the warrants being notified to the persons arrested the omission was cured by this section—18 Cr L J 666 (ALL.)

Error or omission in the charge —See notes under Secs 221 239.

An omission to set out the guilty intention of the accused in a charge will be cured by this section unless it is shown that the omission has occasioned a failure of justice—22 CAL 301. The omission of the word 'dishonestly' in a charge under sec 411 I P C is not a ground of reversing the conviction and sentence, where the accused person

fully understood the nature of the offence with which he was charged and has not been prejudiced by the omission—11 B II C R 373

Where there is ample evidence to show the common object of an assembly, the omission to mention the common object can be cured by this section—2 P L J 511, 18 Cr L J 328 (PAT), 21 CAL 827

But where the charge is defective and the common object of the unlawful assembly is not very precisely set out in the charge, and the charge does not specify the property the taking possession of which is supposed to be the common object of the assembly, the defect in the charge is not cured by this section—33 CAL 295

Errors in frame and contents of charge —See notes under sections 221—225

Omission to read out and explain charge —See notes under section 227

Error and irregularity in adding or altering the charges —See notes under sections 226—232

Misjoinder of charges —See notes under sections 233 239

Irregularity in Proclamation —See notes under sec 87

Error or omission in judgment —See notes under Sec 367

Misdirection to jury —See notes under sec 297

538. No attachment made under this Code shall be deemed unlawful nor shall any person making the same be deemed a trespasser, on account of any defect or want of form in the summons, writ of attachment or other proceedings relating thereto

The word 'attachment' has been substituted for the word 'distress' A similar amendment has been made in sections 386 and 387

CHAPTER XLVI

MISCELLANEOUS

539. Affidavits and affirmations to be used before any High Court or any officer of such Court may be sworn and affirmed before such Court or the Clerk of the Crown, or any Commissioner or other person appointed by such Court for that purpose, or any Judge, or any Commissioner for taking affidavits in any Court of Record in British India, or any Commissioner to adminis-

ter oaths in England or Ireland, or any Magistrate authorized to take affidavits or affirmations in Scotland

A Deputy Magistrate has no power to administer oath to a person making an affidavit under this section to be used in the High Court, and such person cannot be prosecuted for perjury if he makes any false statement in such affidavit—14 CAL 653 But an affidavit to be used in a civil Court may be sworn to before any Magistrate by virtue of Sec 139 of the Civil Procedure Code—8 C W N xl

An affidavit must contain nothing but bare facts known to the person who makes the affidavit either personally or upon information from a source which he believes to be a correct source and one on which reliance can be placed As human beings are liable to make mistakes in reciting facts, the law requires that the contents of affidavits should be carefully read over to the deponents in a language which they understand and should be vouched by them to be correct—36 ALL 13

539-A. (1) *When any application is made to any Court in the course of any inquiry, trial or other proceeding under this Code, and affidavits are made therein respecting any public servant, the applicant may give evidence of the facts alleged in the application by affidavit, and the Court may, if it thinks fit, order that evidence relating to such facts be so given*

An affidavit to be used before any Court other than a High Court under this section may be sworn or affirmed in the manner prescribed in S 539, or before any Magistrate

Affidavits under this section shall be confined to, and shall state separately, such facts as the deponent is able to prove from his own knowledge and such facts as he has reasonable grounds to believe to be true and, in the latter case, the deponent shall clearly state the grounds of such belief

(2) *The Court may order any scandalous and irrelevant matter in an affidavit to be struck out or amended*

This section and the next have been added by the Cr P C Amendment Act 1923 "This new section is intended to discourage the making of false and scandalous statements in petitions filed before the Courts if such petition seeks to impugn the action of subordinate authorities"—*Statement of Objects and Reasons* (1914) "We think that the provisions of this section should apply to all criminal proceedings including appeals We would allow the applicant to give

evidence by affidavit, and would leave the Court a discretion to require this to be done in any case"—*Report of the Select Committee of 1916*

539-B. (1) Any Judge or Magistrate may, at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to visit for the purpose of properly appreciating the evidence given at such inquiry, or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection

(2) Such memorandum shall form part of the record of the case. If the Public Prosecutor, complainant or accused so desires, a copy of the memorandum shall be furnished to him free of cost

Provided that, in the case of a trial by jury or with the aid of assessors, the Judge shall not act under this section unless such jury or assessors are also allowed a view under S. 293

"This section is inserted definitely prescribing that any Judge or Magistrate may at any stage of any inquiry or trial visit and inspect any place connected with the occurrence subject to his recording a note of his inspection.—*Statement of Objects and Reasons* (1914)

"We are of opinion that the Judge or Magistrate shall view the *locus in quo* only for the purpose of properly appreciating the evidence given at the trial and that in the case of trial by jury or with assessors the Judge should only view if the jury or assessors do the same under sec. 293. We also think that notice should be given to the parties of the intention of the Judge or Magistrate to visit the *locus*. We would also provide that the memorandum to be made by the Judge or Magistrate shall form part of the record of the case and that a copy of it may be furnished to both sides.—*Report of the Select Committee of 1916*

If the Judge thinks it necessary or desirable to visit the place of occurrence he should give due notice to the parties and proceed thither with the assessors and the parties before the close of the trial, and before the opinion of the assessors is recorded—1 C L R 143, 9 P W R L T 133 9 L R II 88. If no notice is given to the parties it is not competent to the Judge to take into account any observations of the locality made by him. And where the Judge made an inspection of the locality after the assessors had given their opinion,

the Appellate Court eliminated that portion of the judgment relating to the visit to the spot and the Judge's conclusion therefrom, and decided the case on the other materials—9 L B R 88

As to the circumstances under which a Magistrate making a local inspection is incompetent to try the case, see notes under sections 526 and 536 at pp 1117 and 1171

540. Any Court may, at any stage of any inquiry trial or other proceeding under this Code,

Power to summon material witness or examine person present
 summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case

POWERS UNDER THIS SECTION—This section confers very wide powers upon a Court in the matter of summoning witnesses, but the wider the powers the greater is the exercise of discretion required of the Magistrate. It was not intended by this section that the Magistrate should exercise his powers at the bidding of any person but the powers are given to prevent any danger or miscarriage of justice because some particular witness has not been called—12 A L J 15 This section is a supplementary provision enabling and in certain circumstances imposing on the Court the duty of examining a material witness who would not otherwise be brought before the Court. But a Magistrate misuses this section if he uses it to anticipate the defence of an accused to his prejudice or if he uses it after satisfying him self that the accused has a good defence to discharge the accused instead of acquitting him. A Magistrate cannot resort to this section in order to avoid the responsibility of making up his mind as to the value of the prosecution evidence—1896 P R 11

Who can summon witnesses—No Magistrate other than the one who is seized of the case can summon witnesses under this section—36 ALL 13

'May summon'—It is entirely in the discretion of the Court to call and examine witnesses and the Public Prosecutor cannot demand as a matter of right to call and examine any witness not examined before the committing Magistrate—11 ALL 212

At any stage—A Magistrate can under this section, receive fresh evidence after the evidence on both sides has been taken and

the case adjourned for judgment in as much as the case was still pending when such evidence was taken—21 CAL 167 Where in a criminal trial after the evidence for the defence had closed the Magistrate examined certain witnesses for the prosecution giving at the same time full liberty to the accused to cross examine them the High Court declined to interfere in revision—21 O C 95 But although a Magistrate has discretion to admit evidence on behalf of either side at any stage of the trial still the Magistrate in exercising the discretion ought to have good reasons for allowing witnesses for the prosecution to be interposed in the midst of the case of the accused—21 W R 61 10 A L J 383

But when the trial has been concluded so far that no witnesses remain to be examined on either side and the assessors have given their opinion it is not open to the Sessions Judge to fish for witnesses under this section or to order for further inquiry to be made by the committing Magistrate—1892 P R 4

WHO MAY BE EXAMINED—Under this section the Court is bound to summon and examine any witness whose evidence seems to be essential to the just decision of the case—6 C W N 98 The Court would not be bound to issue summons to witnesses under this section, unless he is satisfied that their evidence will be very material—19 ALL 502 When the committing Magistrate refuses to examine any witnesses mentioned in the list submitted to him under Sec 211 the Sessions Judge can under this section direct those witnesses to be summoned and examined—8 ALL 608 14 ALL 212

Magistrates are at liberty to summon witnesses who are resident outside the limits of their own districts—3 M H C R APP 5

The Magistrate may summon and examine any person as a witness The power to summon a witness is not limited to the witness cited for the prosecution or the defence—1886 P R 11 A person who had been suspected and charged with an offence but was afterwards discharged by the Magistrate for want of evidence may be examined afterwards as a witness for the prosecution—7 W R 44 Where the prosecution declines to examine any witnesses the Court may on its own initiative cause them to be produced and examine them under this section—37 C L J 173 Where the defence is based on Section 84 I P C the Sessions Judge may under this section ascertain the behaviour of the prisoner during the years previous to the homicide and if he has been kept in a lunatic asylum record medical evidence of the facts observed there—Ratanlal 279

But this section does not enable the Court to examine the accused as a witness even in appeal, for an appeal is but the continuation of the original case—12 MAD 451

RIGHT OF PARTIES TO CROSS-EXAMINE—When a Judge thinks it necessary to examine a witness under this section, and does so, the accused as well as the complainant ought to be allowed an opportunity of cross-examining the witness—5 CAL 814, 24 CAL 289. When a witness is called by the Court under this section, both the prosecution and the accused are entitled to cross-examine him on matters relevant to the inquiry, and they are not restricted to the points on which the witness has been examined by the Court—35 CAL 249. Where a witness was at first called for the defence, but afterwards the accused declined to examine him, whereupon he was examined as a witness by the Court, it was held that the accused would not be deprived of his right to cross-examine the witness—20 CAL 387.

540-A. (1) *At any stage of an inquiry or trial under this Code, where two or more accused are before the Court, if the Judge or Magistrate is satisfied for reasons to be recorded, that any one or more of such accused is or are incapable of remaining before the Court, he may, if such accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may at any subsequent stage of the proceedings, direct the personal attendance of such accused.*

(2) *If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit, and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.*

This section has been added by the Cr P C Amendment Act 1923. "This section is designed to meet a practical difficulty which is occasionally experienced in trials involving a large number of accused persons when one or more of them is incapable of remaining at the bar"—*Statement of Objects and Reasons* (1914). "Sub-section (1) provides for the case of an accused who is represented by a pleader, and whose personal attendance can be dispensed with; sub-section (2) provides for the case of an accused who is not so

represented or where continued personal attendance may be necessary and allows the Court in such a case either to adjourn the trial of all the accused or to order the particular accused to be tried separately.

—*Report of the Select Committee of 1910*

541. (1) Unless when otherwise provided by any law Power to appoint for the time being in force, the Local place of imprisonment Government may direct in what place any person liable to be imprisoned or committed to custody under this Code shall be confined.

(2) If any person liable to be imprisoned or committed Removal to criminal to custody under this Code is in con- jail of accused or con- finement in a civil jail the Court or fined persons who are in confinement in civil Jail and their return to the civil jail Magistrate ordering the imprisonment or commitment may direct that the person be removed to a criminal jail.

(3) When a person is removed to a criminal jail under sub-section (1) he shall, on being released therefrom be sent back to the civil jail, unless either—

(a) three years have elapsed since he was removed to the criminal jail in which case he shall be deemed to have been discharged from the civil jail under S. 342 of the Code of Civil Procedure 1882 or

(b) the Court which ordered his imprisonment in the civil jail has certified to the officer in charge of the criminal jail that he is entitled to be discharged under S. 341 of the Code of Civil Procedure 1882.

Jail —The terms Prison and Jail do not include a police lock up. A Magistrate has no power to sentence an accused to suffer imprisonment in a police lock up— I. B. R. 67

Dividing imprisonment in different Jails —A Criminal Court passing a sentence of imprisonment cannot divide the imprisonment in different Jail. From this section and sec. 63 (t) of Act IX of 1894 and the Prisoners Act of 1871 it is clear that the power of directing imprisonment to be undergone in different jails belongs to the Local Government and the Inspector General of Prisons and not to the Court passing sentence—Ratanlal 827

542. (1) Notwithstanding anything contained in the Prisoners Testimony Act, 1869 any Power of Presidency Magistrate to order pri Presidency Magistrate decisions of

soner in jail to be examining, as a witness or an accused brought up for examination person, in any case pending before him, any person confined in any jail within the local limits of his jurisdiction, may issue an order to the officer in charge of the said jail requiring him to bring such prisoner in proper custody, at a time to be therein named, to the Magistrate for examination

(2) The officer so in charge, on receipt of such order, shall act in accordance therewith, and shall provide for the safe custody of the prisoner during his absence from the jail for the purpose aforesaid

543. When the services of an interpreter are required by Interpreter to be any Criminal Court for the interpretation of any evidence or statement, he shall be bound to state the true interpretation of such evidence or statement

It is not necessary to administer oath to an interpreter—16 W R 61 The omission to administer oath to an interpreter under section 5 (b) of the Oaths Act, (X of 1873) renders it necessary for the prosecution to prove that the interpretation was made accurately, but omission to do it does not make the deposition inadmissible in evidence—36 Cal 808

544. Subject to any rules made by the Local Government Expenses of complainant and witnesses * * * any Criminal Court may, if it thinks fit order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceeding before such Court under this Code

Sec 544, and the Rules framed by the Local Government under this section, give a discretion to the Magistrate in the matter of expenses of complainants and witnesses but such discretion should be exercised not arbitrarily but on sound judicial principles—9 BOM L R 353

BENGAL RULES —1 The Criminal Courts are authorized to pay at the rates specified below the expenses (a) of complainants or witnesses whether for the prosecution or for the defence (i) in cases in which the prosecution is instituted or carried on by, or under the orders or with the sanction of the Government, or any Judge, Magistrate or other public officer or in which it shall appear to the

presiding officer, to be directly in furtherance of the interests of the public service, and (ii) in all cases entered in column 5 of the Schedule II appended to the Criminal Procedure Code as not bailable, and (b) of witnesses in all cases in which they are compelled by the Magistrate of his own motion to attend under the provisions of S. 540 of the Code

2 If a witness is summoned at the instance of the complainant or accused under S. 244, his expenses shall not be withheld from him except on the ground of failure to do his duty as a witness when summoned

3 As a general rule the allowances to be paid to complainants and witnesses shall be a diet allowance calculated at the following rates —

- (a) For the ordinary labouring class of natives 2 annas per diem
- (b) For natives of higher rank in life 4 annas per diem
- (c) For Europeans and natives of superior rank a diet allowance according to circumstances up to a limit of Rs 3 per diem

4 In addition to the above charge for toll at ferries will be allowed at the authorized rates to the extent to which they may have been actually incurred

5 Other travelling expenses will be given only when the journey could not have been performed on foot or in the case of persons whose age position and habits of life render it impossible for them to walk. In such cases in addition to diet allowance and ferry tolls, travelling allowance shall be given at the following rates —

- (1) When the journey is by rapid dak by road the actual expenses incurred up to a maximum limit of 4 annas a mile
- (2) When the journey is wholly or partly by rail —
 - (a) For the ordinary class of natives third-class railway fare
 - (b) For natives of higher rank in life, intermediate class railway fare except in the case of Darjeeling-Himalayan Railway where second-class railway fare may be allowed
 - (c) For Europeans and natives of superior rank, second-class railway fare

(3) In the Eastern Districts of Bengal, where the only mode of travelling is by water the actual expenses incurred for boat-hire up to limit of Rs 2 per diem

ed, or of having voluntarily assisted in disposing of stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

CHANGE — Clause (b) has been slightly amended and clause (c) newly added, by the Cr P C Amendment Act 1923. " Clause (b) makes it clear that compensation under section 545 may be paid to any person by whom it would be recoverable in a Civil Court. The payment of compensation to an innocent purchaser of stolen property is provided for in clause (c) when the property is restored to the possession of the person entitled thereto — *Statement of Objects and Reasons* (1914)

CRIMINAL COURT — A Police Patels Court is not a criminal Court and he cannot make an order under this section—*Ratanlal 117*

ORDER WHEN CAN BE MADE — An order of compensation can be made under this section when the Court imposes a fine. If the accused is discharged or acquitted and no fine is imposed, no order under this section can be passed—22 BOM 717 *Ratanlal 107*. Where the Magistrate does not impose any fine but orders the sale of the boat of the accused and directs the compensation to be paid out of the sale proceeds the order is illegal—*Ratanlal 688*. Similarly a

CLAUSE (1)—*Expenses of the prosecution*—The award of costs should not exceed the actual costs of the complainant out of pocket—3 C L R 105

Expenses in this section do not include such expenses as are incurred in bringing the person of the offender before the Magistrate—Ratanlal 608 Where fine is imposed on a person for destroying land marks a portion of the fine so imposed cannot be ordered to be paid to the Amin for the purpose of paying the expenses of his deputation to restore the landmarks destroyed—6 W R 93, such expenses are not expenses incurred in the prosecution Subsistence allowances and cart hire for prosecution witnesses cannot be ordered to be paid by the accused—U B R (1892 96) 7 Court fees and process fees are now provided for in Sec 546A

Expenses should be directed to be paid out of the amount of the fine imposed and a separate order for such expenses is improper—Ratanlal 341, 4 Bom L R 877 An order for expenses to be paid in addition to the fine is illegal—24 MAD 305 5 BOM L R 126, Ratanlal 196 The expenses mentioned in sec 546A may be awarded in addition to fine

CLAUSE (b) —COMPENSATION —*Amount of compensation*—When compensation is awarded under this section the distinction between clauses (a) and (b) of the section should be borne in mind and the order should show whether it is made to defray expenses of the prosecution or as compensation for injury caused by the offence committed—U B R (1892 96) 290 In awarding compensation no sum in excess of the loss actually suffered by the complainant should be ordered to be paid Where the accused was convicted of illegally demanding money and was fined three times the amount of the illegal receipt and the whole of the fine was ordered to be paid to the complainant the order was held to be improper—5 L B R 50 In a theft case it is illegal to award compensation to the complainant in excess of the price of the property stolen from him—1913 P W R 10

Where a complainant cannot recover substantial compensation in Civil Court, compensation cannot be awarded to him under clause (b) but a sum may be awarded to him under clause (a) to defray the expenses of the prosecution—15 Cr L J 555 (BUR) Therefore a Magistrate convicting a person under sec 191 I P C can only order the expenses properly incurred in the prosecution to be defrayed out of the fine but has no power to award compensation substantial compensation

compensation being not recoverable by civil suit for perjury—11 N. L. R. 131

Compensation which are improper—(1) Where in petty cases no pecuniary loss has been sustained by complainants it is improper for the Court to award compensation—1 III R. S. R. 538, but see 2 Weir 717, where it was held that compensation should be awarded where there is substantial cause for it even though the case be frivolous.

(2) Where the accused was convicted and fined for being drunk on a public road no compensation can be awarded to the constable who in arresting the accused had to struggle with him and in so doing lost his whistle and Rs. 50 because such compensation is not for injury caused by the offence committed—1 B. R. (1892-96) 79. A Court cannot award compensation for alleged offences other than those which form the subject of the inquiry in the case in which the order is made—Ratanlal 407.

(3) Where the accused took his sister who was suffering from plague into a town without informing the authorities and was thereupon convicted for an offence under sec. 188 I P. C. no compensation could be awarded to the Municipality on account of the expenses incurred by it in disinfecting the house into which the accused brought the case of plague—Ratanlal 958.

4) Where the offence is under the I P. C. no compensation can be awarded under any other special law. Thus where the accused was fined under sec. 379 I P. C. for cutting trees in a field and out of the fine recovered a reward of Rs. 50 was ordered to be paid to the complainant for detecting the offence it was held that the order of reward was illegal since the offence was under I P. C. and not under the Forest Act—Ratanlal 873. See also—Ratanlal 241.

WHO IS ENTITLED TO COMPENSATION—*Heirs of the deceased*—Under the Code of 1861 compensation could be awarded to the person injured and therefore it could not be paid to the heirs of the person who had been killed—10 W. R. 39. Under the Code of 1872 also the law was practically the same but in the 1882 Code the language of the section has been changed and no mention is specifically made of the person who is entitled to compensation. Still in 12 M.A.D. 352 and 21 M.A.D. 74 the Judges clung to the old view, and held that compensation awarded to the widow of the deceased was illegal. In 36 CAL. 302 and 1898 P. R. 17 it has been held that the heirs of the deceased are entitled to compensation. The present

amendment now makes it clear that compensation may be recovered by any person by whom it can be recovered in a Civil Court.

In awarding compensation to the heirs of the deceased the names of the heirs should be mentioned. An order awarding compensation to the 'nearest heirs,' without specifying who those heirs are, is bad in law—1913 P. R. 18.

Husband of woman enticed away—Where a person is convicted of enticing away a married woman, compensation may be awarded to the husband for injury done to his honour—1878 P. R. 14.

Compensation for injury caused to another—Where the accused was charged with causing hurt to two persons, but was fined for causing injuries to one of them only, compensation out of the fine cannot be awarded to the other person—2 Weir 718.

Refund of compensation—Where a conviction is set aside on appeal and a refund of the fine levied is ordered, and the party who has received a portion of the money as compensation refuses to refund it the only remedy lies in a Civil Court—2 Weir 717. But in 1908 ALL. 112, it has been held that the amount may be recovered by a process under sec. 547 and not necessarily by a suit in a Civil Court.

CLAUSE (c)—*Bona fide purchaser of stolen property*—This clause has been newly added. Under the old law it has been held that when a person is convicted of theft an order awarding compensation out of the fine imposed to the innocent purchaser of the stolen property is not authorised by this section—6 MAD. 386 because the injury to the purchaser is not the consequence of the theft but of the invalid sale—2 Weir 716. On a conviction of theft the stolen property should be returned to the owner but it is illegal to impose a condition that a portion of the fine imposed on the accused should be paid to the innocent purchaser. No such condition can be imposed on the return of property to the owner—3 BOM. L. R. 419. When theft is proved the stolen property will be ordered to be restored to the rightful owner and not to the *bona fide* purchaser. The rule of English law protecting *bona fide* purchasers for value in market overt does not apply in India and on conviction of the accused the property with respect to which the theft was committed should be delivered to the original owner—20 W. R. 78, 1908 P. R. 2. See also 13 A. W. N. 61. In 1878 P. R. 21, it was held however that when stolen property was in the hands of a *bona fide* purchaser the proper order to be made was to leave it in his hands and the remedy of the complainant was to

secure possession of the property in a Civil Court

Under the present law as provided by this clause the compensation will be paid to the innocent purchaser

This clause applies only to a purchaser and not to a mortgagee or pledgee; an innocent mortgagee or pledgee who has advanced money on the security of the stolen property will not be entitled to any compensation—Ratanlal 631, 46 BOM 893

546. At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under S. 545

Taken into account—This expression does not mean that in a subsequent civil suit at the time of awarding damages the amount of compensation recovered under sec. 545 is to be deducted from the damages awarded in the suit—22 W. R. 336 (Civil)

546-A. (1) If henceforth any complaint of a non-cognizable offence is made to a Court, the Court, if it convicts the accused, may, in addition to the penalty imposed upon him, order him to pay to the complainant—

(a) the fee (if any) paid on the petition of complaint, or for the examination of the complainant, and

(b) any fees paid by the complainant for serving process on his witnesses or on the accused,

and may further order that, in default of payment, the accused shall suffer simple imprisonment for a period not exceeding thirty days

(2) An order under this section may also be made by an Appellate Court, or by the High Court, when exercising its powers of revision.

This section has been added by the Cr. P. C. Amendment Act, 1923. "It embodies the provisions of section 31 of the Court Fees Act in order that greater prominence may be given to them"—*Statement of Objects and Reasons* (1914). The provision as to imprisonment in default of payment, and sub-section (2) did not occur in the Court Fees Act. Section 31 of the Court Fees Act has been now repealed by the Cr. P. C. Amendment Act, 1923.

If the complaint is not required by law to be stamped the fact that the Court fee has been illegally levied by the Court will not be a ground of ordering the accused to pay the fee on conviction—8 B H C R 22 Thus no fee is leviable on a complaint by Municipal Officers and the accused on conviction should not be ordered to pay the same—16 MAD 423

A proceeding under the Work men's Breach of Contract Act is not a proceeding for an offence, and if in such a proceeding the work man admits the advance and repays the same it is not open to the Magistrate to make him pay the complainant the Court fee paid on the complaint—6 BOM L R 255

If there are several persons convicted, the order of payment of the value of Court fee and process fee should be joint and not several—*Reg v Sanlara*, BOM H C Cr Rule, 1872

The provisions of this section are not to be controlled by section 545, unlike section 545 the expenses awarded under this section are directed to be paid in addition to fine and not out of the fine imposed—24 MAD 305

According to the Calcutta High Court, the order of payment of Court fee is no part of the principal sentence in the case—20 CAL 687 But the Madras High Court holds that it is an integral part of the sentence—22 MAD 153, 5 M H C R App 28

"May" —We think the Court should not be bound to exercise the power conferred by this section in trivial cases, and have accordingly used the word *may*—*Report of the Joint Committee* (1922)

547. Any money (other than a fine) payable by virtue of any order made under this Code *and the method of recovery of which is not otherwise expressly provided for* shall be recoverable as if it were a fine

The italicised words have been added by the Cr P C Amendment Act 1923 These words provide for the recovery of compensation under sec 250 of costs under sec 148 (3) or the Court fees and process fees mentioned in sec 546A

This section only provides a summary method of realising 'money payable' and these words cannot be stretched so as to include live stock or other good—23 Cr L J 157 (LAW)

An order of refund of compensation paid to the complainant under sec 545 may be enforced by process under this section It is not necessary that the accused should bring a civil suit for recovery of

the money—10 ALJ. 112, 6 ALL. 96, 7 MAD. 563, 1884 P. R. 11; Ratanlal 213

An order by the High Court setting aside an award of compensation (see 250) to the accused must be deemed to be an order directing refund of the money, and such order is enforceable under this section—1885 P. R. 12

548. If any person affected by a judgment or order

Copies of proceed. passed by a Criminal Court desires to
 mgs have a copy of the Judge's charge to
 the jury or of any order or deposition or other part of the
 record he shall, on applying for such copy, be furnished
 therewith

Provided that he pays for the same, unless the Court,
 for some special reason, thinks fit to furnish it free of cost

Affected by judgment order etc.—A complainant whose complaint is dismissed is a person affected by the order of dismissal, and therefore he is entitled to ask for a copy of the Magistrate's order of discharge—Ratanlal 305, 8 CAL. 166 But a 'charge' is not an order of a Criminal Court by which an accused person could be said to be affected within the meaning of this section, so as to entitle him to copies of deposition where the trial has not proceeded beyond the examination of the prosecution witnesses—12 A W N 140

Accused entitled to copies.—A prisoner is entitled to copies of all documents for which he applies and which he thinks necessary for his defence and a Magistrate will be acting contrary to law in determining whether such copies are necessary or not—14 W R 77

549. (1) The Governor General in Council may make
 rules, consistent with this Code and

* Delivery to military authorities of persons liable to be tried by Court-martial the Army Act or any similar law for the
 time being in force as to the cases in

which persons subject to military law shall be tried by a Court to which this Code applies, or by Court martial and when any person is brought before a Magistrate and charged with an offence for which he is liable, under the Army Act S 41, to be tried by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the regiment, corps or detachment to which he belongs, or

to the commanding officer of the nearest military station, for the purpose of being tried by Court martial

(2) Every Magistrate shall, on receiving a written application of such application for that purpose by the persons commanding officer of any body of troops stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence

550. Any police-officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence. Such police-officer it subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.

If a Police officer has reason to suspect certain property to be stolen he must himself seize the property. He cannot order any other person to detain the same—16 O C 371

This section gives the Police officer power to seize only the property suspected to be stolen, but it does not empower him to seize any other property which is mixed with the stolen one—1909 P W R 14

551. Police-officers superior in rank to an officer in charge of a police-station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station.

552. Upon complaint made to a Presidency Magistrate or District Magistrate on oath of the abduction or unlawful detention of a woman, or of a female child under the age of fourteen years, for any unlawful purpose, he may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having the lawful charge of such child, and may compel compliance with such order, using such force as may be necessary.

UNLAWFUL DETENTION—The detention of a child in a missionary school against the will of her parent or guardian with a view that she should be brought up in a religion which such parent or child

disapproved of and the adoption of which would not only involve a total change in the child's mode of life but would also deprive the parent or guardian of any control in the education or bringing up of the child, would amount to unlawful detention—16 CAL 487

The detention of a girl by the father in his house against the will of her husband does not amount to unlawful detention, unless it is shown that the detention was contrary to the wish of the girl—15 CR L J 712 (Cal) If a woman is residing with her relatives who are aiding her in endeavouring to procure a divorce such detention is not unlawful—2 Weir 724

UNLAWFUL PURPOSE —A Magistrate can act under this section when both the detention and the purpose are unlawful In 16 CAL 487 cited above the detention was held to be unlawful but the purpose was not Unlawful purpose means immoral purpose This section applies to female children only and not to children generally, this shows that the purpose has some special reference to the sex of the person against whom it is entertained In other words the section has reference to adultery concubinage prostitution deflowering or other similar purposes But it certainly does not include the detention of a Hindu girl in a Christian Institution in order that she may be a Christian or the detention of a Christian child in a Muhammadan Institution in order that she may be Mahomedan—6 16 CAL 487 See also 4 BOM L R 609

PROCEDURE —It is the District Magistrate who alone has jurisdiction to entertain a complaint and make an order under this section He has no power to transfer such a case to a Sub Magistrate and that Magistrate would have no jurisdiction therein—Ratanlal 963

An application under this section does not necessarily allege the commission of an offence and is not a complaint consequently the provisions of sec 200 and 203 do not apply to proceedings under this section—4 BOM L R 609

Where a Magistrate has reason to believe that a woman is unlawfully detained but cannot find who so detains her the proper course is for the Magistrate to issue an order to have the woman brought before him and to examine her it would be illegal for the Magistrate in such case to order the restoration of the woman to liberty without any finding that she was unlawfully detained by any one and without ordering any one to restore her to liberty—2 Weir 724

An application to get back a girl from her father's custody on the allegation that she is the wife of the applicant must be made to

the Civil Court and not to the Magistrate under this section—10 C W N 1xxv

553. (1) Whenever any person causes a police-officer to arrest another person in a presidency-

Compensation to persons groundlessly given in charge in presidency town town, if it appears to the Magistrate by whom the case is heard that there was no sufficient ground for causing such arrest, the Magistrate may award such compensation, not exceeding fifty rupees, to be paid by the person so causing the arrest to the person so arrested, for his loss of time and expenses in the matter, as the Magistrate thinks fit

(2) In such cases, if more persons than one are arrested, the Magistrate may, in like manner, award to each of them such compensation, not exceeding fifty rupees, as such Magistrate thinks fit

(3) All compensation awarded under this section may be recovered as if it were a fine, and if it cannot be so recovered, the person by whom it is payable shall be sentenced to simple imprisonment for such term not exceeding thirty days as the Magistrate directs, unless such sum is sooner paid

554. (1) With the previous sanction of the Governor

Power of chartered High Courts to make rules for inspection of records of subordinate Courts General in Council, the High Court at Port William, and with the previous sanction of the Local Government, any other High Court established by Royal Charter may, from time to time, make rules for the inspection of the records of subordinate Courts

Power of other High Courts to make rules for other purposes (2) Every High Court not established by Royal Charter may, from time to time, and with the previous sanction of the Local Government,—

(a) make rules for keeping all books, entries and accounts to be kept in all Criminal Courts subordinate to it, and for the preparation and transmission of any returns or statements to be prepared and submitted by such courts;

(b) frame forms for every proceeding in the said Courts for which it thinks fit that such form should be pro-

(c) make rules for regulating its own practice and proceedings and the practice and proceedings of all Criminal Courts subordinate to it; and

(d) make rules for regulating the execution of warrants issued under this Code for the levy of fines:

Provided that the rules and forms made and framed under this section shall not be inconsistent with this Code or any other law in force for the time being

(3) All rules made under this section shall be published in the local official Gazette.

555. Subject to the power conferred by S. 554 and by S. 107 of the Government of India Act, 1915 the forms set forth in the fifth schedule, with such variation as the circumstances of each case require, may be used for the respective purposes therein mentioned, and if used shall be sufficient

"With such variation" —There being no prescribed form of warrant under section 100, a Magistrate who had to issue one under that section adapted a form under sec. 96 to the provision of sec. 100 by altering the figures and by drawing up the warrant in terms required by sec. 100. It was held that the warrant was perfectly legal—45 CAL 903

556. No Judge or Magistrate shall except with the permission of the Court to which an appeal

Case in which Judge or Magistrate is personally interested lies from his Court, try or commit for trial any case to or in which he is a party or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself

Explanation —A Judge or Magistrate, shall not be deemed a party, or personally interested, within the meaning of this section, to or in any case by reason only that he is a Municipal Commissioner or otherwise concerned therein in a public capacity, or by reason only that he has viewed the place in which an offence is alleged to have been committed, or any other place in which any other transaction material to the case is alleged to have occurred, and made an inquiry in connection with the case

Illustration

A, as Collector, upon consideration of information furnished to him, directs the prosecution of B for a breach of

the Exercise Laws. A is disqualified from trying this case as a Magistrate.

Principle—It is one of the oldest and plainest rules of justice and common sense that no man shall sit as a Judge in a case in which he has a distinct and substantial interest—2 CAL 23. “The law in laying down the strict rule that if a Judge had any legal interest in the decision of the case, he is disqualified from trying it, however small that interest may be, had regard not so much to the motives which might be supposed to bias the Judge, as to the susceptibilities of the litigant parties. One important object, at all events is to clear away everything which might engender suspicion and distrust in the tribunal and to promote the feelings of confidence in the administration of justice which is so essential to social order and security”—*Sergeant v. Dale* 2 Q B D 558, 20 CAL 857.

A Magistrate who is disqualified under this section to try a case is not a Court of ‘competent jurisdiction’ in respect to that case and if he tries that case, the defect is not cured by Sec 537—23 CAL 328. Nor will the defect be cured by any consent or waiver on the part of the accused—2 CAL 23, 32 ALL 635, 9 N L R 81, 7 A L J 749, 1 S L R 98, 4 LAH L J 152.

Try or commit any case—The expression ‘try any case’ is wide enough to include any stage of judicial proceeding in which the guilt or innocence of the accused is finally adjudicated upon—5 S L R 137. Thus he cannot hear an *appeal* in the case. The word ‘try’ is comprehensive enough to include the hearing of an appeal—23 CAL 11, 17 C W N 111, 19 A W N 74, 4 LAH L J 452, 9 N L R 81, 1 S L R 98. He is also debarred from interfering in *revision* to the prejudice of the accused—1905 U B R (Cr P C) 37. He cannot direct further inquiry under sec 195—5 S L R 137 (*Contia*—27 ALL 25).

But a Magistrate can *initiate* proceedings even though he is personally interested in the case—2 CAL 23. Though a Magistrate is disqualified under this section to try a case on account of personal interest he is not on that account, debarred from granting a permission to another Magistrate to proceed with the case—20 ALL 181.

In which he is a party—Where a Magistrate while travelling in a railway carriage requested the accused who were his fellow passengers to desist from smoking and on their contemptuous refusal to do so arrested and subsequently tried and convicted them it was held that the Magistrate was legally and morally dis-

qualified from exercising his judicial functions in relation to the offences imputed—Ratanlal 339. So also a Magistrate who was one of the persons obstructed by the accused driving on the wrong side of the road, could not himself try the accused for the offences under secs. 28 and 29 of the Bombay Act VII of 1867—Ratanlal 321.

PERSONALLY INTERESTED—The words 'personally interested' do not imply mere *intellectual* interest but something of the nature of an expectation of advantage to be gained or of a loss or some disadvantage to be avoided by the person who is said to be interested in the case—8 BOM. L. R. 947. Thus a public officer whose duty it is to see that the law is obeyed can not, merely by reason of that duty, be said to be personally interested in the prosecution and trial of an offender—15 ALL. 192. The words 'personally interested' cannot refer to any *remote* interest in the matter but must refer to some particular and immediate personal interest in the case and its result—15 ALL. 192. The law does not measure the amount of interest which a Judge possesses. If he has any legal interest in the decision of the question one way, he is disqualified, no matter how small the interest may be—*Sergeant v. Dale* 2 Q. B. D. 538, 14 N. J. R. 14.

Instances—(1) *Taking part in arrest of accused and Police proceedings*—Where the Magistrate took an active part in dispersing the unlawful assembly and pursuing the members and arresting them and subsequently he initiated proceedings against the accused and himself tried and convicted them, it was held that the Magistrate should not have tried the case himself as he had initiated and directed the whole proceedings and could be said to have been personally interested in them—20 CAL. 837. Where the investigation of the Police at the preliminary inquiry was directed by a Magistrate to a considerable degree and where the Magistrate himself traced some of the accused and ordered their arrest, he was disqualified from trying the case—23 CAL. 328. A Magistrate who takes more than a formal part in a police investigation should not try the case—2 L. B. R. 209.

(2) *Interest by being a witness*—A Magistrate cannot in a case in which he is the sole judge of law and fact be a competent witness. The trial and conviction by a Magistrate of an accused in a case wherein he (the Magistrate) is himself a witness is illegal—2 CAL. 405. 20 Cr. I. J. 45 (Pat), 1904 P. L. R. 21. A Magistrate cannot import matters into his judgment not stated on oath before the Court in the presence of the accused. If he does so, he makes himself

a witness in the case, and renders himself incompetent to try it—20 Cr L J 15 (PAT), 20 CAL 857 A Magistrate holding a local investigation and obtaining information from various sources as regards the commission of an offence is incompetent to try a case—21 CAL 920 A Magistrate who becomes aware of some of the facts in connection with a case by his taking some part, or at any rate by being present at a search made by the Police during investigation should not try the case but transfer it to some other Magistrate—5 C W N 861 An officer should not try an offence under sec 171 I P C, in his capacity as a Magistrate, when the offence has been committed before him in his capacity as a settlement officer—2 ALL 405 But if during the course of the trial, the Magistrate himself made a statement on oath which he recorded, and permitted himself to be cross-examined and re-examined, it was held that he was not incompetent to try the case—27 ALL 33

(3) *Pecuniary interest* —A Magistrate who is a shareholder of the company which is the complainant in the case, is disqualified from trying the case. In such cases, it is not necessary to enquire whether there was any real or substantial ground for suspecting bias on his part—20 BOM 502 See also 2 CAL 23 A Magistrate should not entertain a criminal case in which persons indebted to him are concerned either as complainant or as accused—C P C Ch Part II, No 59

(4) *Magistrate being servant of complainant* —A Magistrate who is a servant of the corporation was held to have such an interest in the result of a prosecution by the corporation as to disqualify him from trying the case—7 CAL 322, 10 CAL 194, 19 BOM 605

(5) *Magistrate being master of complainant* —The mere fact that the Magistrate is the master of the complainant who was complaining on his own account merely, does not deprive the Magistrate of his jurisdiction, though in such a case it would generally be expedient for him to refer the complainant to some other Magistrate—9 BOM 172 But where the complainant was the servant of the Magistrate and it appeared that the Magistrate's wife was driving in the dog-cart for passing which the accused has been charged with rash and negligent driving, the Magistrate was held to be personally interested and he ought not to try the case—14 BOM 572.

(6) *Interest by being Agent of Court of Wards* —The mere fact that the District Magistrate is, in his capacity as Collector concerned in the management of an estate under the Court of Wards does not

disqualify him from trying a case of theft arising out of a dispute between the landlord and tenant in an estate under the management of the Court of Wards—46 Cal 851, 28 CAL 297 But where the manager of an estate under the Court of Wards, who was also appointed the sub-divisional officer drew up proceedings under sec 145 against one who disputed the possession of a piece of land in which the estate claimed an interest, and the Magistrate refused an application for transfer of the case, it was held that the Magistrate showed a lack of appreciation of ordinary principles which should guide judicial officers in matters of the kind—9 C W N cccxvi

(7) *Sanctioning or directing prosecution*—See notes under sec. 487 A Magistrate who takes a mere formal part in the prosecution cannot be said to direct the prosecution and is not therefore deprived of his jurisdiction in the case Thus a Magistrate who simply issued process as officer in-charge of Sudder subdivision is not precluded from hearing an appeal in the case—46 CAL 869 10 BUR L T 150 Where a Magistrate under the Excise Act lays before the Inspector of Police certain information regarding the conduct of the accused in his dealings in opium and directs the said Inspector to make an inquiry on the basis of that information and a prosecution is subsequently instituted in the ordinary course by the investigating Police Officer it was held that the Magistrate cannot be said to have such connection with the proceedings antecedent to the prosecution as would debar him from trying the accused—11 A L J 652 Where a Deputy Tahsildar made a report to the Tahsildar about certain offences and the Tahsildar in his turn reported the matter to the Deputy Magistrate who authorised the Tahsildar to prosecute the accused and the Tahsildar then lodged a complaint before the Deputy Magistrate who tried the case it was held that the Deputy Magistrate was not disqualified since he merely *authorised* the prosecution and not *directed* it A distinction should be drawn between authorisation and direction of prosecution—21 MAD 233 But where a District Magistrate who as inspector of factories ordered an inquiry to be made and in the same capacity directed the prosecution of the accused for an offence under the Factories Act he was disqualified from trying the case—1 Lah 35 A Magistrate who upon information furnished to him directs the issue of a warrant under sec 9 of the Gambling Act, is disqualified from trying the case—13 Bur L T. 151 Where after the close of a trial the trying Magistrate orders the Police to send up a charge-sheet in respect of a

witness for the prosecution, and upon the Police doing so, tries that person and convicts him, *held* that the Magistrate having directed the prosecution of the accused is not competent to hold the trial—23 BOM L R 812

EXPLANATION —Under the Explanation a Magistrate is not deemed to be a party or personally interested in any case by reason of the fact that he is a Municipal Commissioner or otherwise concerned therein in a public capacity. But if in addition to a connection of that sort, he directs the prosecution of a person for an offence he is disqualified from trying the case, not by reason of the fact that he is a Municipal Commissioner or publicly connected with the case but by reason of the further fact that he has constituted himself the prosecutor—5 S L R 137, 19 A W N 74, 23 BOM L R 812. Thus the mere fact that the Magistrate might happen to be a Municipal Commissioner does not necessarily disqualify him from holding a trial in which some Municipal matter was involved. But it is a very different matter when it is found that the Magistrate is practically one of the prosecutors and the Judge—10 CAL 1030. The mere fact that the Magistrate is the Vice President of the Municipality and Chairman of the Managing Committee does not disqualify him from trying an offence against the Municipality. But if he has taken any part in promoting the prosecution as for instance by concurring in sanctioning it at a meeting of the Managing Committee or otherwise he would be disqualified—18 BOM 412, 1896 P R 5. So also if the Magistrate is the Vice President of a Municipal Committee and was present at the meeting in which the resolution was passed for the disobedience of which the accused is prosecuted, the Magistrate is debarred from trying the case—23 Cr L J 704 (Lah). A Magistrate does not by reason of his being a member of a sub-committee of a Municipal Board become personally interested so as to be disentitled to try the accused for an offence against the Municipal Board—27 ALL 25. But if he presides at a meeting of the Municipal Board which directs the prosecution of the accused, he becomes disqualified—11 N L R 115 S L R 137, 20 Cr L J 211 (Nag). It may be that he did not speak or vote at the meeting but the fact remains that he attended the meeting where the question was debated and the prosecution ordered, and he has therefore placed himself personally to some extent in the position of a prosecutor—5 S L R 137. Where the Municipal Committee resolved to institute criminal proceedings against the accused and directed the Secretary to take necessary

steps, and the Secretary forwarded a copy of the resolutions to the Joint Magistrate (who was none other than the Secretary himself) who took proceedings and tried the accused, it was held that the trial was not only illegal but a mere show—3 A W N 181 The District Magistrate is not disqualified from hearing the appeal merely because he happens to be the *Chairman of the Municipal Board*—19 A W N 74 (*Contra*—23 CAL 44 and 15 MAD 83 where it is held that the very fact that the Chairman of the Municipality is the Magistrate disqualifies him from trying the offence and the Explanation does not apply to his case)

In 10 CAL 194 a distinction has been drawn between a salaried officer of a Corporation and an Honorary Officer and it has been held that the Explanation does not apply to a salaried officer. A salaried officer of the Corporation is by reason of the very fact that he is a servant of the Corporation precluded from trying any Municipal case as a Magistrate. But a gentleman who without remuneration is merely discharging a public and honorary office and who has no personal interest in the proceeding of the Municipality may well be supposed to be free from that bias which the jealousy of the law presumes in other persons more immediately interested.

Concerned therein in a public capacity —A Magistrate in charge of opium and excise administration of a district is not personally interested in the observation of the provisions of the Opium Act merely because it is his duty to see the law relating to sale of opium enforced and maintained in his district. He is therefore not precluded from exercising jurisdiction in respect of offences against the said Act—15 ALL 192 5 A L J 35. A District Magistrate is not precluded under this section from trying an offence under the Police Act merely because he is the head of the Police—22 ALL 340. The fact that a District Magistrate is also District Superintendent of Police does not of itself disqualify him from trying or inquiring into cases investigated by the Police of his District—2 I B R 709. But if the Magistrate in his public capacity *directs the prosecution* he is disqualified. Thus where the Magistrate as president of the Octroi sub-committee directed the prosecution of an accused for evading the payment of Octroi the Magistrate was debarred from trying the case even though the accused had consented to be so tried—32 ALL 635.

LOCAL INSPECTION —Under the Code of 1862 it was held that a Magistrate making a personal inspection of the *locus in quo* where the offence was committed makes himself a witness in the case and

thereby renders himself incompetent to try the case—19 MAD 263 But now the law has been changed by the addition of the latter part of the Explanation

A Magistrate is competent to inspect personally a locality in order to test the connection of the evidence and plans of the locality submitted in the case Such an inspection would not disqualify him from trying the case—1901 P R 13, where the Magistrate inspected the *locus in quo* and stated in his judgment what he saw when he inspected, he was not disqualified—2 Weir 728 Where a Magistrate made a local inspection in the presence of both the parties and the pleaders and stated in his judgment some facts which he then observed, it was held that the Magistrate was competent to convict the accused persons—2 Weir 727 But if the Magistrate goes to inspect the locality accompanied with one party only (e g the complainant) he cannot try the case—1901 P L R 165 12 C W N 748 Where a Magistrate in visiting the scene of occurrence not merely noted the various features of importance but imported into his judgment what he could not have possibly noted from the locality or from anything connected therewith (e g the position of the accused and other men at the time of the alleged occurrence) he exceeded the proper limits of his discretion in making the inspection and thus disqualified himself from trying the case—3 C W N 607

INQUIRY —The holding of an inquiry under sec 202 does not disqualify the Magistrate from trying the case—24 CAL 167

557. No pleader who practises in the Court of any Magistrate in a presidency-town or district shall sit as a Magistrate in such Court or in any Court within the jurisdiction of such Court

The appointment of a pleader to act as Presidency Magistrate is not forbidden by any provision of the Code The only thing required of him is to give up practice on appointment—23 BOM 490

558. The Local Government may determine what, for the purpose of this Code, shall be deemed to be the language of such Court within the territories administered by such Government, other than the High Courts established by Royal Charter.

“With the permission of the presiding Judge or Magistrate, any Advocate or Pleader may address the Court in English when any one

of the pleaders on the opposite side is acquainted with that language, or whenever the senior of such pleaders or his clients consents to that being done"—Cr. G. R. & C. D., p. 78.

553. (1) *Subject to the other provisions of this Code*
Provision for powers the powers and duties of a Judge or
of Judges and Magis- *Magistrate may, be exercised or per-*
strates being exercised *formed by his successor in office,*
by their successors in
office

(2) *When there is any doubt as to who is the successor in office of any Magistrate, the Chief Presidency Magistrate in a Presidency-town, and the District Magistrate outside such town, shall determine by order in writing the Magistrate who shall, for the purposes of this Code or of any proceedings or order thereunder, be deemed to be the successor in office of such Magistrate*

(3) *When there is any doubt as to who is the successor in office of any Additional or Assistant Sessions Judge, the Sessions Judge shall determine by order in writing the Judge who shall, for the purposes of this Code or of any proceedings or order thereunder, be deemed to be the successor in office of such Additional or Assistant Sessions Judge.*

This section has been redrafted by the Cr. P. C. Amendment Act, 1923. The old section stood as follows —

“359 All powers conferred by this Code on the Governor-General in Council, or on the Local Government, may be exercised from time to time as occasion requires”

But this section was unnecessary because its provisions are covered by section 14 of the General Clauses Act. The old section has therefore been omitted and an entirely different section has been passed in its place. “A new section is intended to be inserted, providing for the powers of Judges and Magistrates being exercised by their successors-in-office, and the determination by the Chief Presidency or District Magistrate of the person to be deemed the successor-in-office of a Subordinate Magistrate in cases of doubt.—*Statement of Objects and Reasons* (1914)

Officers concerned in sales not to purchase or bid for property **560.** A public servant having any duty to perform in connection with the sale of any property under this Code shall not purchase or bid for the property

561. (1) Notwithstanding anything in this Code, no Special provisions with respect to offence of rape by a husband Magistrate except a Chief Presidency Magistrate or District Magistrate shall—

- (a) take cognizance of the offence of rape where the sexual intercourse was by a man with his wife or,
- (b) commit the man for trial for the offence

(2) And, notwithstanding anything in this Code, if a Chief Presidency Magistrate or District Magistrate deems it necessary to direct an investigation by a police-officer, with respect to such an offence as is referred to in sub-Sec (1), no police-officer of a rank below that of police-inspector shall be employed either to make, or to take part in the investigation

Clause (d) —Where the offence referred to in this clause was taken cognizance of by the District Magistrate, the fact that the investigation into the offence had been conducted by a Police officer was not a material irregularity which would vitiate the proceedings—
15 A W N 9

561-A. *Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice*

This section has been added by the Cr P C Amendment Act 1923. "By this section it is proposed to give statutory recognition to the inherent powers of the High Court—a principle which is already well recognised" —*Statement of Objects and Reasons* (1914)

"Or otherwise to secure the ends of justice" —"We have slightly elaborated the provisions of this clause. We understand that a High Court has recently held (41 All 401) that it had no power to direct the expunging of objectionable matter from a record. We think it desirable that it should be made clear that this clause is intended to meet such a case" —*Report of the Joint Committee* (1922)

See 41 All 401 and other cases cited under sec. 439 under heading "Power to expunge remarks from lower Court's judgment"

562. In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any other offence under the Indian Penal Code punishable with not more than two years' imprisonment before any Court, and no previous conviction is proved against him, if it appears to the Court before whom he is so convicted, that, regard being had to the youth, character and antecedents of the offender, to the trivial nature of the offence and to any extenuating circumstances under which the offence was committed, it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond with or without sureties and during such period (not exceeding one year) as the Court may direct, to appear and receive sentence when called upon, and in the meantime to keep the peace and be of good behaviour:

562. (1) *When any person not under twenty-one years of age is convicted of an offence punishable with imprisonment for not more than seven years, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or transportation for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, * * * and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct, and in the meantime to keep the peace and be of good behaviour*

561. (1) Notwithstanding anything in this Code, no Special provisions Magistrate except a Chief Presidency with respect to offence Magistrate or District Magistrate of rape by a husband shall—

(a) take cognizance of the offence of rape where the sexual intercourse was by a man with his wife or,

(b) commit the man for trial for the offence

(2) And, notwithstanding anything in this Code, if a Chief Presidency Magistrate or District Magistrate deems it necessary to direct an investigation by a police-officer, with respect to such an offence as is referred to in sub-Sec (1), no police officer of a rank below that of police-inspector shall be employed either to make, or to take part in the investigation

*Clause (2) —*Where the offence referred to in this clause was taken cognizance of by the District Magistrate, the fact that the investigation into the offence had been conducted by a Police officer was not a material irregularity which would vitiate the proceedings—
15 A W N 9

561-A. *Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice*

This section has been added by the Cr P C Amendment Act 1923 "By this section it is proposed to give statutory recognition to the inherent powers of the High Court—a principle which is already well recognised" —*Statement of Objects and Reasons* (1914)

"Or otherwise to secure the ends of justice" —"We have slightly elaborated the provisions of this clause. We understand that a High Court has recently held (44 All 101) that it had no power to direct the expunging of objectionable matter from a record. We think it desirable that it should be made clear that this clause is intended to meet such a case. —*Report of the Joint Committee* (1922)

See 44 All 101 and other cases cited under sec 139 under heading "Power to expunge remarks from lower Court's judgment"

562. In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any other offence under the Indian Penal Code punishable with not more than two years' imprisonment before any Court, and no previous conviction is proved against him, if it appears to the Court before whom he is so convicted, that, regard being had to the youth, character and antecedents of the offender, to the trivial nature of the offence and to any extenuating circumstances under which the offence was committed, it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond with or without sureties, and during such period (not exceeding one year) as the Court may direct, to appear and receive sentence when called upon, and in the meantime to keep the peace and be of good behaviour.

562. (1) *When any person not under twenty-one years of age is convicted of an offence punishable with imprisonment for not more than seven years, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or transportation for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, * * * and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct the Court may instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct, and in the meantime to keep the peace and be of good behaviour.*

Provided that, where any first offender is convicted by a Magistrate of the third class, or a Magistrate of the second class not specially emponered by the Local Government in this behalf, and the Magistrate is of opinion that the power conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class or Subdivisional Magistrate, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in manner provided by S 380

(2) *An order under this section may be made by any Appellate Court or by the High Court when exercising its power of revision*

(3) *When an order has been made under this section in respect of any offender, the High Court may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law*

Provided that the High Court shall not under this subsection inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted

(4) *The provisions of Ss 122, 126A and 406A shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section*

CHANGE —Subsection (1) has been substantially amended, and Subsections (2) to (4) have been newly added by the Cr P C Amendment Act. The main changes are the following —“First, this section extends the list of offences in conviction for which a person may be released upon probation, *secondly*, it is made clear that section 562 does not apply merely to the case of *youthful* offenders but applies to a wider class of persons, *thirdly*, the word ‘trivial’ has been omitted, *fourthly*, the period for which an offender may be released under this section has been extended from one to three years, *fifthly*, power has been conferred on an Appellate Court or upon a High Court in the exercise of its revisional jurisdiction to make an order under section 562 and *finally* the High Court has been empowered either on appeal or revision to inflict sentence of imprisonment in lieu of an order under this section”—*Statement of Objects and Reasons* (1911)

SCOPE OF SECTION —This section has no reference to age and its operations are not limited to *juvenile offenders*. It applies to

persons of advanced age—2 BOM L R 817, 1916 P. R. 11; 18 Cr. L. J. 469 (MAD.); 2 L R R. 314. The intention of the law is not to make it essential that the offender must be young or that the offence must be trivial in its nature etc.; but merely to indicate the lines on

[To page 1176.]

After subsection (t) of section 562, the following subsection shall be inserted, namely:—

(1A) In any case in which a person is convicted of theft, theft in a building, dishonest mis-
Conviction and release with admonition. appropriation, cheating, or any other offence under the Indian Penal Code, punishable with not more than two years' imprisonment and no previous conviction is proved against him, the Court before whom he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

This amendment has been made by the Cr. P. C. Second Amendment Act, XXXVII of 1923. This is almost the same as the earlier part of the old section 562.

(BUR)

This section should not be applied indiscriminately to all cases of first offenders—2 L B R 314 Where the offender is a person of good position in life, he should rather be dealt with under this section than sentenced to whipping—1907 P W R 9

Section does not apply where sentence has been passed—This section cannot be applied to a case in which the Magistrate has not only convicted the accused person but sentenced him as well to imprisonment and fine—17 A L J 426 The words in the section are 'instead of sentencing him'

OFFENCES REFERRED TO IN THIS SECTION —Under the old law this section applied only where the offender was convicted of one of certain offences under the *Penal Code*, and not of an offence under *any other law* e.g. an offence under the Indian Railways Act—1 N L R 139, or an offence under the Excise Act—1916 P R 19. This restriction has now been removed.

The old section could not apply where the offender was punishable with more than 2 years imprisonment. Thus, it could not apply where the accused was convicted of criminal breach of trust—7 BUR L R 14, or of receiving stolen property—2 BOM L R 343, or of lurking house trespass—15 C P L R 11, or of using as genuine a forged document—17 BOM L R 921, or of house breaking—18 Cr L J 469 (MAD), or of aggravated form of cheating under sec 420 I P C—3 L B R 95 1 LAH 612, 41 MAD 533, or to an offence under sec 381 I P C—4 N L R 18. All these cases will now fall under the present section.

No order can be made under this section where the accused has been convicted of an offence not falling under this section, even though he has also been convicted in the same trial of an offence falling under this section—2 Weir 731.

WHO CAN PASS ORDER —An order under this section can be passed not only by the court which convicted the accused but also by the Appellate Court, as well as by the High Court in revision—21 All 306, 29 Mad 567, 25 C W N 720. This is now expressly provided in the new subsection (2).

BOND —The bond to be taken should be not only to keep the peace and to be of good behaviour, but to appear and receive sentence when called upon and in the meantime to keep the peace and be of good behaviour—2 BOM L R 112. But it is not competent to a Magistrate to direct the accused to appear in Court on a fixed day to receive sentence, all he can do is to release the accused on probation of good conduct for a certain period and to direct him to appear and receive sentence when called upon during such period, if he does not observe the conditions of the bond—2 BOM L R 702.

Bond by minor —The third proviso to section 118 providing for bond of minors to be executed by their sureties applies only to bonds under that section and does not apply to bonds of first offenders released under this section. Under this section a bond may be executed by the minor himself and not by his sureties. The words 'or

has entered into a bond' are clear—4 L B R 12 (overruling 2 L B R 137) But see the new section 514 B

Inability to furnish security —The view that if an accused person is ordered to give security under this section and he fails to do so he should be detained in prison till the expiration of the period for which security is to be furnished, is not in accordance with any provision of this Code The proper course is for the Magistrate, before passing an order under this section, to ascertain whether the accused is likely to be able to give security immediately or within a reasonable time If he fails to give security within a reasonable time the Magistrate should pass a sentence which should be only nominal—3 L B R 2

PROVISO —*Power of Second Class Magistrate* —It is not open to a Second Class Magistrate who has not been specially empowered to exercise jurisdiction under the first part of this section to take proceedings under that part although he was invested by a notification issued under the 1882 Code with all the powers specified in the fourth schedule of that Code—2 Weir 731

Power of the Magistrate to whom proceedings are submitted — See notes under sec 380

Joint trial of young and aged offenders —Where the first accused aged nearly 50 and the second accused a boy of 11 were charged of theft before a Second Class Magistrate and the Magistrate sent the case of both the accused to a First Class Magistrate so that the second accused might be dealt with under sec 562 it was held that the Second Class Magistrate should have disposed of the case of the first accused according to law without submitting the case to the First Class Magistrate and that he should have submitted the case of the second accused only—2 BOM 1 R 112

APPEAL AND REVISION —An appeal lies from an order under this section releasing a convict on his entering into a bond—1901 P R 21 And the appeal may be preferred even after the expiry of the period of the bond—1917 P R 20 So also the High Court in revision can set aside the conviction and the order demanding security even though the convicts have not moved the High Court to exercise that power—1912 P W R 7 1914 P W R 12

It was held under the old law that in setting aside in revision the order under this section the High Court could not substitute in its place a sentence of imprisonment because no sentence had been passed by the Lower Court (the order under sec 562 not being a 'sentence') and the provisions of sec 43 as to enhancement of

sentence did not apply—37 ALL 31, if the Appellate or Revisional Court considered that any sentence should be passed upon the accused, it could order a retrial—1911 P R 16, 37 ALL 31. But the new subsection (3) now empowers the High Court, in appeal or in revision, to pass sentence on the accused after setting aside the order as to security.

563. (1) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(2) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence. Such Court may, after hearing the case, pass sentence.

564. (1) The Court, before directing the release of an offender under S. 562, shall be satisfied that the offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(2) Nothing in this section or in Sections 562 and 563 shall affect the provisions of S. 31 of the Reformatory Schools Act, 1897.

Previously-convicted offenders

565. (1) When any person having been convicted—

(a) by a Court in British India of an offence punishable under S. 215, 489 I, S. 489 B, S. 489 C or S. 489 D, of the Indian Penal Code, or of any offence punishable under Chapter XII or Chapter XVII of that code, with imprisonment of either description for a term of three years or upwards, or

(b) by a Court or Tribunal in the territories of any Prince or State in India acting under the general or

*special authority of the Governor General in Council, or of any Local Government, of any offence which would, if committed in British India, have been punishable under any of the aforesaid sections or Chapters of the Indian Penal Code with like imprisonment for a like term, is again convicted of any offence punishable under any of those sections or Chapters with imprisonment for a term of three years or upwards by a High Court, Court of Session, Presidency Magistrate, District Magistrate, Sub-divisional Magistrate, or Magistrate of the first class. * * ** such Court or Magistrate may, if it or he thinks fit, at the time of passing sentence of transportation or imprisonment on such person, also order that his residence and any change of *or absence from such residence* after release be notified as hereinafter provided for a term not exceeding five years from the date of the expiration of such sentence

(2) If such conviction is set aside on appeal or otherwise, such order shall become void

(3) The Local Government may make rules to carry out the provisions of this section relating to the notification of residence *or change of or absence from residence* by released convicts

(4) An order under this section may also be made by an Appellate Court or by the High Court when exercising its powers of revision

(5) Any person against whom an order has been made under this section and who refuses or neglects to comply with any rule so made shall be deemed within the meaning of section 176 of the Indian Penal Code *to have omitted to give a notice required for the purpose of preventing the commission of an offence*

(6) Any person charged with a breach of any such rule may be tried by a Magistrate of competent jurisdiction in the district in which the place last notified by him as his place of residence is situated

CHANGE—This section has been almost redrafted by the Cr P C Amendment Act, 1923. The main changes introduced are the following—“*Firstly*, it extends the list of offences after a conviction for which a person may be required to notify his residence and subsequent changes of residence, *secondly*, on the analogy of section 75 of the Penal Code, as amended in 1910, provision has been made for previous convictions before tribunals of Native States which exercise their jurisdiction under the general or special authority of the Government of India or the Local Government, *thirdly*, all first class Magistrates, in place of those specially empowered, have been authorised to pass orders under this section, *fourthly*, the rule making power has been extended to cover the provision of this section relating to the notification of residence, or change of residence, or absence from residence, of released convicts, *fifthly*, the punishment for a breach of the rules made under this section has been enhanced, and *lastly*, Courts of Appeal or revision have been empowered to pass orders under this section’—*Statement of Objects and Reasons* (1914)

APPLICATION OF SECTION—This section applies only when the accused has been *previously* convicted, the passing of an order under this section on a first offender is illegal—8 M L T 302

This section does not apply where either the previous or the subsequent conviction is for an *attempt* to commit the offences under Chap XII or XVII of the I P C—1907 P R 17

This section does not apply where the accused, in the subsequent conviction is sentenced to *whipping*—35 BOM 137. An order under this section can be passed only when the accused is sentenced to *translocation* or *imprisonment*.

This section does not apply where the subsequent conviction is a technical one. Where a person is found only technically guilty of theft it is absurd to make his conviction of such a trifling offence the occasion for a long period of Police supervision under this section—1911 P W R 3

Under the old law, this section did not apply where the previous conviction had been in a Native State even though the law of that State was identical in terms with the Indian Penal Code—1 N L R 137. But now this section *does* apply to such a case. See clause (b) which has been newly added.

Under the old law, a first class Magistrate could not pass orders under this section unless he was specially authorised by the Local

Government to do so—8 S L R 340 Under the present law, all 1st class Magistrates can pass orders under this section

Previous conviction need not be specified in charge—An order under this section is not such a punishment as is meant by the words of sec 221 Therefore the provisions of sec 221 (7) do not apply to an order under this section and such an order can be legally passed without the previous conviction on which it is based having been mentioned in the charge The omission is a mere irregularity cured by sec 537—9 N L R 88

NOTIFICATION OF RESIDENCE—*Change of residence*—As long as a man retains his residence in the same place, his temporary absence from home for a day or two does not require notification Whether he retains his residence must always be a question of fact, but provided a man leaves his family and household effects in the house in which he was residing, he would ordinarily be considered to retain his residence there Where all that was proved was that the accused was absent from his notified residence for a single night, there was nothing to indicate that the residence itself was changed, and it is not necessary that he should notify such temporary absence for a single night—40 MAD 789 But under the present law, *absence from residence* must also be notified

POWER OF APPELLATE COURT—Under the old law, it was held that an Appellate Court could not pass an order under this section where the original Court did not or could not do so—8 S L R 340 But now sub-section (1) gives such power to the Appellate Court and to the High Court in revision

PUNISHMENT—Under the old law it was held that any person refusing or neglecting to comply with the rules made under sub-section (3) is punishable as if he had committed an offence under the *first part* (and not *second part*) of section 176 I P C—1 N L R 131, 31 MAD 548 Under the present sub-section (5) the use of the words “notice required for the prevention of commission of an offence” show that the punishment will henceforth be under the *second part* of sec 176 I P C In other words the punishment has been enhanced under the present section

BENGAL RULES—(a) A convict against whom such an order has been passed shall fourteen days before the date fixed for his release give to the Superintendent of the Jail in which he is confined a true statement of the place in which he will take up his residence after his release Such statement shall be in writing and shall be

CHANGE —This section has been almost redrafted by the Cr P C Amendment Act, 1923. The main changes introduced are the following —“*Firstly*, it extends the list of offences after a conviction for which a person may be required to notify his residence and subsequent changes of residence, *secondly*, on the analogy of section 75 of the Penal Code, as amended in 1910, provision has been made for previous convictions before tribunals of Native States which exercise their jurisdiction under the general or special authority of the Government of India or the Local Government, *thirdly*, all first class Magistrates, in place of those specially empowered, have been authorised to pass orders under this section, *fourthly*, the rule making power has been extended to cover the provision of this section relating to the notification of residence or change of residence, or absence from residence of released convicts, *fifthly*, the punishment for a breach of the rules made under this section has been enhanced and *lastly* Courts of Appeal or revision have been empowered to pass orders under this section”—*Statement of Objects and Reasons* (1914)

APPLICATION OF SECTION —This section applies only when the accused has been *previously* convicted the passing of an order under this section on a first offender is illegal—8 M L T 352

This section does not apply where either the previous or the subsequent conviction is for an *attempt* to commit the offences under Chap VII or XVII of the I P C—1907 P R 17

This section does not apply where the accused in the subsequent conviction is sentenced to *whipping*—35 BOM 137. An order under this section can be passed only when the accused is sentenced to *transportation* or *imprisonment*

This section does not apply where the subsequent conviction is a technical one. Where a person is found only technically guilty of theft it is absurd to make his conviction of such a trifling offence the occasion for a long period of Police supervision under this section—1911 P W R 3

Under the old law, this section did not apply where the previous conviction had been in a Native State, even though the law of that State was identical in terms with the Indian Penal Code—I N L R 117. But now this section *does* apply to such a case. See clause (b) which has been newly added

Under the old law, a first class Magistrate could not pass orders under this section unless he was specially authorised by the Local

Government to do so—8 S L R 340 Under the present law, all 1st class Magistrates can pass orders under this section

Previous conviction need not be specified in charge —An order under this section is not such a punishment as is meant by the words of sec 221 Therefore the provisions of sec 221 (7) do not apply to an order under this section and such an order can be legally passed without the previous conviction on which it is based having been mentioned in the charge The omission is a mere irregularity cured by sec 537—9 N L R 88

NOTIFICATION OF RESIDENCE —*Change of residence* —As long as a man retains his residence in the same place, his temporary absence from home for a day or two does not require notification Whether he retains his residence must always be a question of fact, but provided a man leaves his family and household effects in the house in which he was residing he would ordinarily be considered to retain his residence there Where all that was proved was that the accused was absent from his notified residence for a single night, there was nothing to indicate that the residence itself was changed, and it is not necessary that he should notify such temporary absence for a single night—40 MAD 789 But under the present law, *absence* from residence must also be notified

POWER OF APPELLATE COURT —Under the old law, it was held that an Appellate Court could not pass an order under this section where the original Court did not or could not do so—8 S L R 340 But now sub-section (1) gives such power to the Appellate Court and to the High Court in revision

PUNISHMENT —Under the old law it was held that any person refusing or neglecting to comply with the rules made under sub-section (3) is punishable as if he had committed an offence under the *first part* (and not second part) of section 176 I P C—1 N L R 133 31 MAD 518 Under the present sub-section (5) the use of the words ‘notice required for the prevention of commission of an offence’ show that the punishment will henceforth be under the *second part* of sec 176 I P C In other words the punishment has been enhanced under the present section

BENGAL RULES —(a) A convict against whom such an order has been passed shall fourteen days before the date fixed for his release give to the Superintendent of the Jail in which he is confined a true statement of the place in which he will take up his residence after his release Such statement shall be in writing and shall be

CHANGE—This section has been almost redrafted by the Cr P C Amendment Act, 1923. The main changes introduced are the following—*“Firstly*, it extends the list of offences after a conviction for which a person may be required to notify his residence and subsequent changes of residence, *secondly*, on the analogy of section 75 of the Penal Code, as amended in 1910, provision has been made for previous convictions before tribunals of Native States which exercise their jurisdiction under the general or special authority of the Government of India or the Local Government, *thirdly*, all first class Magistrates, in place of those specially empowered, have been authorised to pass orders under this section, *fourthly*, the rule making power has been extended to cover the provision of this section relating to the notification of residence, or change of residence, or absence from residence, of released convicts, *fifthly*, the punishment for a breach of the rules made under this section has been enhanced, and *lastly*, Courts of Appeal or revision have been empowered to pass orders under this section”—*Statement of Objects and Reasons* (1914)

APPLICATION OF SECTION—This section applies only when the accused has been *previously* convicted, the passing of an order under this section on a first offender is illegal—8 M L T 352

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This section does not apply where the accused, in the subsequent conviction is sentenced to *whipping*—35 BOM 137. An order under this section can be passed only when the accused is sentenced to *transportation or imprisonment*

This section does not apply where the subsequent conviction is a technical one. Where a person is found only technically guilty of theft, it is absurd to make his conviction of such a trifling offence the occasion for a long period of Police supervision under this section—1911 P W 113

Under the old law, this section did not apply where the previous conviction had been in a Native State, even though the law of that State was identical in terms with the Indian Penal Code—1 N L R 137. But now this section *does* apply to such a case. See clause (b) which has been newly added

Under the old law, a first class Magistrate could not pass orders under this section unless he was specially authorised by the Local

SCHEDULES.

SCHEDULE I

ENACTMENTS REPEALED

(Repealed by the Amending and Repealing Act 1 of 1914)

Offences under the following Secs of the I. P. C may be tried by any Magistrate —140, 143, 144, 145, 147, 151, 153, 160, 170, 171, 172, 174, 277, 278, 279, 285, 286, 289, 290, 294 A, 323, 334, 336, 341, 352, 356, 357, 358, 374, 379, 380, 403, 426, 447, 448, 451, 504, 510

Offences under the following Secs I P C, may be tried by First or Second-class Magistrates —135, 136, 137, 138, 154, 155, 156, 157, 158, 165, 166, 173, 175, 176, 177, 178, 179, 180, 182, 183, 184, 185, 186, 187, 188, 189, 190, 202, 203, 206, 207, 217, 221 A, 241, 254, 259, 260, 261, 262, 264, 265, 266, 267, 269, 270, 271, 272, 273, 274, 275, 276, 280, 282, 283, 284, 287, 288, 291, 292, 293, 294, 295, 296, 297, 298, 309, 318, 324, 325, 335, 337, 338, 342, 343, 353, 354, 355, 381, 384, 385, 404, 405, 406, 408, 411, 414, 417, 418, 419, 421, 422, 423, 424, 427, 428, 429, 430, 431, 432, 434, 451, 452, 453, 454, 456, 457, 461, 462, 482, 483, 486, 487, 488, 489, 490, 491, 492, 498, 508

Offences under the following Secs of the I P C. to be tried by First class Magistrates only:—124 A, 129, 133, 148, 152, 153 A, 161, 162, 163, 164, 167, 168, 169, 181, 193, 196, 197, 198, 199, 200, 201 A, 204, 205, 208, 209, 210, 211, 212, 213 A, 214 A, 215, 216, 221, 222 A, 223, 224, 225, 229, 233, 235, 237, 239, 240, 242, 243, 246, 247, 248, 249, 250, 251, 252, 253, 263, 304 A, 326, 332, 344, 345, 346, 347, 348, 363, 365, 369, 372, 373, 377, 382, 392, 393, 394, 401, 407, 409, 420, 435, 440, 455, 458, 465, 468, 469, 484, 485, 497, 500, 501, 502, 505, 506, 507, 509

Offences under the following Secs of the I P. C to be tried as warrant cases —115—136, 144—148, 152, 153, 153 A, 159, 161—170, 177, 181, 189—201, 203—227, 229—267, 270, 281, 295—333, 335, 338, 342—348, 353—357, 363—424, 427—440, 448—489, 493—509, 511

Offences under the following Secs, I P C, to be tried as summons cases:—137—143, 151, 153—158, 160, 171—180, 182—188, 202, 225, 1, 228, 263 A, 269, 271—280, 281—294, 334, 336, 337, 341, 352, 358, 426, 447, 490—492, 510

Offences under the following Secs, I P C are to be tried as warrant cases, sometimes as summons cases —153—177, 225

Offences under the following Secs, I P. C., are punishable with fine only:—137, 154, 155, 156, 263 A, 278, 283, 290, 294 partly.

signed by the convict in the presence of the Superintendent of the Jail who will countersign it. The following rules shall be also clearly explained to the convict before he leaves the jail, he shall be told for what period he is required to observe them and a copy of them shall be given to him.

(b) If the convict after release does not within ten days take up his residence in the place mentioned in such statement, he shall attend in person at the Police station within the jurisdiction of which he has taken up his residence and notify to the officer in charge his place of residence.

(c) If after taking up his residence in any place the convict desires to change his residence he shall attend in person at the Police station within the jurisdiction of which his then place of residence is situated and there notify to the officer in charge the place to which he intends to change his residence and the date on which the change will take place. Such attendance shall be not less than seven days before his departure when he is moving to another thana and not less than two days when he is moving to a place within the same thana. If for any reason he does not within seven days of the date on which he has notified that his change of residence will begin, take up his residence at that place, he shall at once notify, in the manner above set out, the place where he intends to reside.

(d) If the convict intends to travel to another district, he shall not less than seven days before his departure, similarly notify the place to which he intends to proceed and the probable dates of his arrival at the departure from such places.

(e) In applying the foregoing rules to the case of a wandering man having no "residence" in the sense of a fixed place of abode, the place of residence shall be deemed to be the place where he sleeps even if he remains there only one night. On his release he shall be asked under clause (a) of this rule where he intends to stay, and be told that if he moves about the country he must always notify the place of his temporary abode to the Police.—C I T G R d C O pp 78-80

Similar rules have been framed in Assam. See *Assam Gazette* 1902 Part II, pp 80-81.

110	Abetment of any offence, if the person abetted does the act with a different intention from that of the abettor	Ditto	...	Ditto	.	Ditto	...	Ditto	...	Ditto
111	Abetment of any offence, when one act is abetted and a different act is done, subject to the proviso	Ditto	.	Ditto	...	Ditto	.	Ditto	...	Same punishment as for the offence in tended to be abet ted
112	Abetment of any offence, when an effect is caused by the act abetted different from that intended by the abettor	Ditto	.	Ditto	...	Ditto	.	Ditto	...	Same punishment as for the offence committed
113	Abetment of any offence, if abettor is present when offence is committed	Ditto	.	Ditto	.	Ditto	.	Ditto	.	Ditto
114	Abetment of an offence, punishable with death or transportation for life, if the offence be not committed in consequence of the abetment	Ditto	.	Ditto	.	Ditto	.	Ditto	.	Ditto
115	If an act which causes harm be done in consequence of the abetment	Ditto	.	Ditto	...	Not B.	...	Ditto	...	Imp of either description for 7 years and fine
116	Abetment of an offence, punishable with imprisonment, if the offence be not committed in consequence of the abetment.	Ditto	...	Ditto	...	Ditto	...	Ditto	.	Imp e d for 14 years and fine
		Ditto	...	Ditto	...	As in the offence abetted	...	Ditto	.	Imp of the longest term, provided for the offence, or fine, or both

SCHEDULE II.

TABULAR STATEMENT OF OFFENCES

EXPLANATORY NOTE.—The entries in the second and seventh columns of this schedule, headed respectively "Offence" and "Punishment under the Indian Penal Code," are not intended as definitions of the offences and punishments described in the several corresponding sections of the Indian Penal Code, or even as abstracts of those sections, but merely as references to the subject of the section, the number of which is given in the first column.

The third column of this schedule applies also to the Police in the towns of Calcutta and Bombay

[**ABBREVIATIONS.**—Cog = cognizable (may arrest without warrant, Not cog = not cognizable (shall not arrest without warrant), Not B = not bailable, Not Com = not compoundable, Imp = imprisonment, e d = of either description, S I = simple imprisonment, Ses = Session, P Mag = Presidency Magistrate, Mag = Magistrate, C P M = Chief Presidency Magistrate)]

CHAPTER V—ABETMENT.

Section	1	2	3	4	5	6	7	8
	Offence	Cognizable or not	Warrant or summons	Bailable or not	Compoundable or not	Punishment under the I P C	By what Court triable	
109	Abetment of any offence, if the act abetted is committed in consequence, and where no express provision is made for its punishment	Cog, if the offence abetted is Cog	As in the offence abetted	As in the offence abetted	As in the offence abetted	Same punishment as for the offence abetted	The Court by which the offence abetted is triable	

	If the offence be not committed.	Ditto ...	Ditto ...	As in the offence abetted.	Ditto ...	As in the offence abetted.	Ditto ...	As in the offence abetted.	Ditto ...	As in the offence abetted.	Imp. of the longest term, provided for the offence, or fine, or both.	Ditto.
120	Concerning a design to commit an offence punishable with imprisonment, if the offence be committed	Cog. if the offence abetted is Cog	Ditto ...	As in the offence abetted	Ditto ...	As in the offence abetted	Ditto ...	As in the offence abetted	Ditto ...	As in the offence abetted	Imp. of the longest term, provided for the offence, or fine, or both.	Ditto
	If the offence be not committed	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imp. of the longest term, provided for the offence, or fine, or both.	Ditto.

CHAPTER V.A—OF CRIMINAL CONSPIRACY.

120 B	Criminal conspiracy to commit an offence punishable with death, transportation, or rigorous imprisonment for a term of two years or upwards	Cog. if the offence which is the object of the conspiracy is Cog.	As in the offence which is the object of the conspiracy.	As in the offence which is the object of the conspiracy.	Not Com.	Same punishment as for the abetment of the offence which is the object of the conspiracy.	Court of Session, when the offence which is the object of the conspiracy is triable exclusively by such Court; in all other cases, Court of Session, P. Mag., or Mag. 1st class.
	Any other criminal conspiracy	Shall not arrest without warrant.	Summons	Barable	Ditto ...	Imp e. d. for six months or fine or both	P. Mag., or Mag. of the 1st class.

Section.	1	2	3	4	5	6	7	8
		Offence	Cognizable or not	Warrant or summons	Bailable or not.	Com- poundable or not	Punishment under the I. P. C.	By what Court triable
		If the abettor or the person abetted be a public servant whose duty it is to prevent the offence	Cog. if the offence abetted is Cog	As in the offence abetted	As in the offence abetted.	As in the offence abetted	Imp of the longest term, provided for the offence, or fine, or both	The Court by which the offence abetted is triable
117		Abetting the commission of an offence by the public, or by more than ten persons.	Ditto ...	Ditto ...	Ditto ..	Ditto ...	Imp e d for 3 years, or fine, or both.	Ditto.
118		Concerning a design to commit an offence punishable with death or transportation for life, if the offence be committed	Ditto ...	Ditto	Not B ..	Ditto	Imp. e d. for 7 years and fine	Ditto.
		If the offence be not committed	Ditto ...	Ditto ...	Ditto ..	Ditto	Imp e. d. for 3 years and fine.	Ditto.
119		A public servant concerning a design to commit an offence which it is his duty to prevent, if the offence be committed.	Ditto ...	Ditto ..	As in the offence abetted	Ditto ...	Imp of the longest term, provided for the offence, or fine, or both.	Ditto
		If the offence be punishable with death or transportation for life	Ditto ...	Ditto	Not B ...	Ditto ...	Imp e d for 10 years	Ditto

120	If the offence be not committed.	Ditto ...	Ditto ...	As in the offence abetted.	Ditto ...	$\frac{1}{2}$ Imp. of the longest term, provided for the offence, or fine, or both	Ditto.
	Concealing a design to commit an offence punishable with imprisonment, if the offence be committed	Cog. if the offence abetted is Cog.	Ditto ...	As in the offence abetted	As in the offence abetted.	$\frac{1}{2}$ Imprisonment of the longest term, provided for the offence, or fine, or both	Ditto.
	If the offence be not committed	Ditto ...	Ditto ...	Ditto	Ditto ...	$\frac{1}{2}$ Imprisonment of the longest term, provided for the offence, or fine, or both.	Ditto.

CHAPTER V.A—OF CRIMINAL CONSPIRACY.

120 B	Criminal conspiracy to commit an offence punishable with death, transportation, or rigorous imprisonment for a term of two years or upwards	Cog. if the offence which is the object of the conspiracy is Cog.	As in the offence which is the object of the conspiracy.	As in the offence which is the object of the conspiracy.	Not Com.	Same punishment as for the abetment of the offence which is the object of the conspiracy.	Court of Session, when the offence which is the object of the conspiracy is triable exclusively by such Court; in all other cases, Court of Session, P. Mag., or Mag. 1st class
	Any other criminal conspiracy.	Shall not arrest without warrant.	Summons	Bailable	Ditto ...	Imp e. d. for six months or fine or both	P. Mag., or Mag. of the 1st class.

Section	Offence	Cognizable or not	Warrant or summons	Bailable or not	Compoundable or not	Punishment under the I. P. C.	By what Court triable
117	If the abettor or the person abetted be a public servant whose duty it is to prevent the offence	Cog, if the offence abetted is Cog	As in the offence abetted	As in the offence abetted	As in the offence abetted	; Imp of the longest term, provided for the offence, or fine, or both	The Court by which the offence abetted is triable
118	Abetting the commission of an offence by the public, or by more than ten persons, Concerning a design to commit an offence punishable with death or transportation for life, if the offence be committed	Ditto	Ditto	Ditto	Ditto	Imp e d for 3 years, or fine, or both	Ditto
119	If the offence be not committed	Ditto	Ditto	Ditto	Ditto	Imp e d for 7 years and fine	Ditto
120	A public servant concealing a design to commit an offence which it is his duty to prevent if the offence be committed	Ditto	Ditto	Ditto	Ditto	Imp e d for 3 years and fine	Ditto
121	If the offence be punishable with death or transportation for life	Ditto	Ditto	Not B	Ditto	Imp of the longest term, provided for the offence, or fine, or both	Ditto
122		Ditto	Ditto	Not B	Ditto	Imp e d for 10 years	Ditto

Ditto	Ditto	Ditto	Trans. for life and fine, or imp e d for 7 years and fine, or fine	Court of Session
Ditto	Ditto	Ditto	Imp e d for 7 years and fine, and forfeiture of certain property	Ditto.
Ditto	Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Ditto	Trans for life, or imp e d for to years, and fine	Ditto
Not Com	Warrant	Not Com	5 l for 3 years and fine	Court of Session, 1 st Mag or Mag 1 st class
Ditto	Ditto	Ditto	Trans. for life, or imp e d for to years, and fine	Court of Session

OFFENCES RELATING TO THE ARMY AND NAVY

Com	Warrant	Not Com	Trans for life, or imp e d for to years, and fine	Court of Session
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Section.	1	2	3	4	5	6	8
		Offences.	Cognizable Warrant or or not summons	Bailable or not.	Com- poundable or not.	Punishment under the I. P. C.	By what Court triable.
121		Waging or attempting to wage war, or abetting the waging of war against the Queen	Not Cog.	Warrant	Not B ...	Not Com.	Death, or transportation for life, and forfeiture of property.
121 A		Conspiring to commit certain offences against the State	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Court of Session
122		Collecting arms, etc., with the intention of waging war against the Queen	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Trans. for life or any shorter term, or Imp e d. for 10 years.
123		Concuring with intent to facilitate a design to wage war.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Trans for life, or imp e d for 10 years, and forfeiture of property
124		Assaulting Governor General, Governor, etc., with intent to compel or restrain the exercise of any lawful power	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imp e d. for 10 years and fine.
124 A		Sedition	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imp. e d for 7 years and fine
124 B		Ditto ...	Ditto ...	Ditto ...	Ditto ...	Trans for life or for any term and fine, or imp e d. for 3 years and fine, or fine
124 C		Ditto ...	Ditto ...	Ditto ...	Ditto ...	Court of Session, C P. M. or District Magistrate or M class, specially empowered

Ditto	Ditto	Ditto	Ditto	Trans, for life and fine, or imp e d for 7 years and fine, or fine	Court of Session
Ditto	Ditto	Ditto	Ditto	Imp e d for 7 years and fine, and forfei- ture of certain pro- perty	Ditto
Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Ditto	Ditto	Trans for life, or imp e d for 10 years, and fine	Ditto
Not Com	Warrant	Publible	Not Com	S I for 3 years and fine	Court of Session, 1 st Mag or Mag 1st class
Ditto	Ditto	Not B	Ditto	Trans, for life, or imp e d for 10 years, and fine	Court of Session

OFFENCES RELATING TO THE ARMY AND NAVY.

Com	Warrant	Not B...	Not Com	Trans for life, or imp e d for 10 years, and fine	Court of Session
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Section.	1	2	3	4	5	6	7	8
		Offences.	Cognizable or not.	Warrant or summons.	Bailable or not.	Com- poundable or not.	Punishment under the 1 P. C.	By what Court triable.
132		Abetment of mutiny, if mutiny is committed in consequence thereof.	Cog. ...	Warrant	Not B. ...	Not Com.	Death, or trans. for life, or imp e. d. for 10 years, and fine.	Court of Session.
133		Abetment of an assault by an officer, soldier or sailor on his superior officer, when in the execution of his office.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imp. e. d. for 3 years, and fine.	Court of Session, P. Mag. or Mag. 1st class.
134		Abetment of such assault, if the assault is committed.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imp. e. d. for 7 years, and fine.	Court of Session.
135		Abetment of the desertion of an officer, soldier or sailor.	Ditto ...	Ditto ...	Bailable	Ditto ...	Imp. e. d. for 2 years, or fine, or both.	P. Mag. or Mag. 1st or 2nd class.
136		Harbouring such an officer, soldier or sailor who has deserted.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto.
137		Deserter concealed on board merchant-vessel, through negligence of master or person in charge thereof	Not Cog.	Summons	Ditto ...	Ditto ...	Fine of 500 rupees ...	Ditto.
138		Abetment of act of insubordination by an officer, soldier or sailor, if the offence be committed in consequence.	Cog. ...	Warrant	Ditto ...	Ditto ...	Imp e d for 6 months, or fine, or both.	Ditto.

		Wearing the dress or carrying any token used by a soldier with intent that it may be believed that he is such a soldier	Ditto	Summons	Ditto	Ditto	Imp e d for 3 months, or fine of 500 rupees, or both	Any Mag
140								
CHAPTER VIII—OFFENCES AGAINST THE PUBLIC TRANQUILLITY.								
143	Being a member of an unlawful assembly	Cog	Summons	Bailable	Not Com	Imp e d for 6 months, or fine or both	Any Mag	
144	Joining an unlawful assembly armed with any deadly weapon	Ditto	Warrant	Ditto	Ditto	Imp e d for 2 years, or fine, or both	Ditto	
145	Joining or continuing in an unlawful assembly knowing that it has been commanded to disperse	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto	
147	Rioting	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto	
148	Rioting armed with a deadly weapon	Ditto	Ditto	Ditto	Ditto	Imp e d for 3 years, or fine or both	Court of Ses, P Mag or Mag 1st class	
149	If an offence be committed by any member of an unlawful assembly, every other member of such assembly shall be guilty of the offence	Cog if the offence is committed by any member of an unlawful assembly, every other member of such assembly shall be guilty of the offence	As in the offence	As in the offence	Not Com	Sum e is for the offence	Court by which the offence is triable	

Section	1	2	3	4	5	6	7	8
		Offences	Cognizable or not	Warrant or summons	Bailable or not	Com poundable or not	Punishment under the P C	By what Court triable
150		hiring engaging or employing persons to take part in an unlawful assembly	Cog	According to the offence committed by the persons hired, etc	As in the offence	Not Com	The same as for a member of such assembly, and for any offence committed by any member of such assembly	Court by which the offence is triable
151		knowingly joining or continuing in any assembly of five or more persons after it has been commanded to disperse	Ditto	Summons	Bailable	Ditto	Imprisoned for 6 months, or fine or both	Any Mag
152		Assaulting or obstructing public servant when suppressing riot etc	Ditto	Warrant	Ditto	Ditto	Imprisoned for 3 years, or fine, or both	Court of Ses, P Mag, or Mag 1st class
153		Wantonly giving provocation with intent to cause riot, if rioting be committed	Ditto	Ditto	Ditto	Ditto	Imprisoned for 1 year, or fine, or both	Any Mag
		If not committed	Ditto	Summons	Ditto	Ditto	Imprisoned for 6 months, or fine or both	Ditto
153A		Promoting enmity between classes	No Cog	Warrant	Not B	Ditto	Imprisoned for 2 years or fine, or both	P Mag 1st class

154	Owner or occupier of land not giving information of riot, etc.	Ditto ...	Summons	Bailable	Ditto ...	Fine of 1,000 rupees ...	P. Mag., or Mag. 1st or 2nd class.
155	Person for whose benefit or on whose behalf a riot takes place not using all lawful means to prevent it	Ditto ..	Ditto ..	Ditto ...	Ditto ...	Fine ..	Ditto
156	Agent of owner or occupier for whose benefit a riot is committed not using all lawful means to prevent it	Ditto ..	Ditto ...	Ditto ...	Ditto ..	Ditto ...	Ditto
157	Flourishing persons hired for an unlawful assembly	Cog ..	Ditto ..	Ditto ..	Ditto ...	Imprisoned for 6 months, or fine, or both	Ditto
158	Being hired to take part in an unlawful assembly or riot	Ditto ..	Ditto ..	Ditto ...	Ditto ..	Ditto ..	Ditto
159	Or to go armed	Ditto ...	Warrant	Ditto ..	Ditto ..	Imprisoned for 2 years, or fine, or both	Ditto
160	Committing offence	Not Cog	Summons	Ditto ..	Ditto ..	Imprisoned for 1 month, or fine of 100 rupees, or both.	Any Mag.

CHAPTER IX—OFFENCES BY OR RELATING TO PUBLIC SERVANTS

161	Being or expecting to be a public servant, and taking a gratification other than legal remuneration in respect of an official act	Not Cog.	Summons	Bailable	Not Com	Imprisoned for 3 years, or fine, or both.	Ct. of Se., P. Mag., or Mag. of the 1st class
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Section	1	2	3	4	5	6	7	8
		Offence	Cognizable or not	Warrant or summons	Bailable or not	Com- poundable or not	Punishment under the 1 P C	By what Court triable
162		Giving a gratification in order to corrupt or illegal means to influence a public servant	Not Cog	Summons	Bailable	Not com	Imprisoned for 3 years, or fine, or both	Ct of Ses, P Mag, or Mag 1st class
163		Taking a gratification for the exercise of personal influence with a public servant	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 year or fine or both	P Mag, or Mag 1st class
164		Abetment by public servant of the offences defined in the last two preceding clauses with reference to himself	Ditto	Ditto	Ditto	Ditto	Imprisoned for 3 years, or fine or both	Ct of Ses, P Mag, or Mag 1st class
165		Public servant obtaining any valuable thing without consideration from a person concerned in any proceeding, or business transacted by such public servant	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 2 years, or fine, or both	P Mag, or Mag 1st or 2nd class
166		Public servant disobeying a direction of the law with intent to cause injury to any person	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 year, or fine, or both	Ditto
167		Public servant framing an incorrect document with intent to cause injury	Ditto	Ditto	Ditto	Ditto	Imprisoned for 3 years, or fine or both	Ct of Ses, P Mag, or Mag 1st class

168	Public servant unlawfully en- gaging in trade	Ditto	..	Ditto	Ditto	..	Ditto	Simple imp for 1 year, or fine or both	P Mag, or Mag 1st class
169	Public servant unlawfully buying or bidding for pro- perty	Ditto	.	Ditto	..	Ditto	..	Simple imp for 2 years, or fine, or both and confiscation of pro- perty purchased	Ditto
170	Personating a public servant	Cog		Warrant	Ditto	Ditto		Imp ed for 2 years, or fine or both	Any Mag
171	Wearing grab or carrying token used by public ser- vant with fraudulent intent	Ditto		Summons	Ditto	Ditto		Imp ed for 3 months, or fine of 200 rupees, or both	Ditto

CHAPTER IX A—OFFENCES RELATING TO ELECTIONS

171 E	Bribery	Not Cog	Summons	Bailable	Not Com	Imp ed for one year, or fine, or both	Ditto	P Mag or Mag of the 1st class
171 F	Undue influence and per- sonation at an election	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
171 G	False statement in connec- tion with an election	Ditto	Ditto	Ditto	Ditto	Fine	Ditto	Ditto
171 H	Illegal payments in connec- tion with elections	Ditto	Ditto	Ditto	Ditto	Fine of 500 rupees	Ditto	Ditto
171 I	Failure to keep election ac- counts	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

CHAPTER X—CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS

172	Abandoning to avoid service of summons or other pro- ceedings from a public ser- vant	Not Cog	Summons	Bailable	Not com	S I for 1 month, or fine of 500 rupees, or both	Any Mag
	If summons or notice require attendance in person, etc., in a Court of justice	Ditto	Ditto	Ditto	Ditto	S I for 6 months, or fine of 1 000 rupees, or both	Ditto

Section.	1	2	3	4	5	6	7	8
		Offence	Cognizable or not	Warrant or summons	Bailable or not.	Com- poundable or not	Punishment under the P. C.	By what Court triable
181		Knowingly stating to a public servant on oath as true that which is false	Not Cog.	Warrant	Bailable	Not com	Imp e d. for 3 years, and fine	Ct. of Ses., P. Mag., or Mag. 1st class.
182		Giving false information to a public servant in order to cause him to use his lawful power to the injury or annoyance of any person	Ditto	Summons	Ditto	Ditto	Imp e d for 6 months, or fine of 1,000 rupees, or both	P. Mag., or Mag. 1st or 2nd class
183		Resistance to the taking of property by the lawful authority of a public servant.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
184		Obstructing sale of property offered for sale by authority of a public servant	Ditto	Ditto	Ditto	Ditto	Imp e. d. for 1 month, or fine of 500 rupees, or both	Ditto.
185		Bidding by a person under a legal incapacity to purchase it, for property at a lawfully authorized sale, or bidding without intend- ing to perform the obligations incurred thereby	Ditto	Summons	Ditto	Ditto	Imp e. d. for 1 month, or fine of 200 rupees, or both	P. Mag., or Mag. 1st or 2nd. class.

186	Obstructing public servant in discharge of his public functions	Ditto	...	Ditto	..	Ditto	...	Ditto	..	Imp e d for 3 months, or fine of 500 rupees, or both	Ditto
187	Omission to assist public servant when bound by law to give such assistance.	Ditto	..	Ditto		Ditto	..	Ditto	...	5 imp for 1 month, or fine of 200 rupees or both	Ditto
	Willfully neglecting to aid a public servant who demands aid in the execution of process, the prevention of offences, etc	Ditto	..	Ditto	.	Ditto	...	Ditto	...	5 imp for 6 months, or fine of 500 rupees, or both	Ditto.
188	Disobedience to an order lawfully promulgated by a public servant if such disobedience causes obstruction, annoyance or injury to persons lawfully employed.	Ditto	...	Ditto	..	Ditto	..	Ditto	..	5 imp for 1 month, or fine of 200 rupees, or both	Ditto
	If such disobedience causes danger to human life, health or safety, etc	Ditto	..	Ditto	.	Ditto	..	Ditto	...	Imp e d for 6 months, or fine of 1,000 rupees, or both	Ditto.
	public servant in or one arrested, or.	Ditto	..	Ditto	...	Ditto	..	Ditto	...	Imp e d. for 2 years, or fine, or both	Ditto
		Do	..	Ditto	...	Ditto	...	Ditto	...	Imp e d for 1 year, or fine or both	Ditto

8

7

6

5

4

3

Offence

By what Court
triable

Punishment under the
I P C

Com-
poundable
or not

Bailable
or not

Warrant or
summons

Cognizable
or not

Ct of Ses P Mag
or Mag 1st class

Imprisoned for 7 years
and fine

Not Com

Bailable

Warrant

Not Cog

giving or fabricating false
evidence in a judicial pro-
ceeding

Ditto

Imprisoned for 3 years
and fine

Ditto

Ditto

Ditto

Ditto

giving or fabricating false
evidence in any other case

Ditto

Transportation for life
or rigorous imprisonment for
10 years and fine

Ditto

Not B

Ditto

Ditto

giving or fabricating false
evidence with intent to
procure conviction of an
offence punishable with
transportation for life or
with imprisonment for
10 years or upwards

Ditto

Death or as above

Ditto

Ditto

Ditto

Ditto

giving or fabricating false
evidence with intent to
procure conviction of an
offence punishable with
transportation for life or
with imprisonment for
10 years or upwards

Ct of Ses, P Mag
or Mag 1st class

Same as for giving or
fabricating false evi-
dence

Ditto

As in the
offence
of giving
such evi-
dence

Ditto

Ditto

giving or fabricating false
evidence with intent to
procure conviction of an
offence punishable with
transportation for life or
with imprisonment for
10 years or upwards

	Not Cog	Warrant	Seizable	Not Com	Same as for giving false evidence	Ct of Ses, P Mag, or Mag 1st Class
197	Knowingly issuing or signing a false certificate relating to any fact of which such certificates by law admissible in evidence	Ditto	Ditto	Ditto	Ditto	Ditto
198	Using as a true certificate one known to be false in a material point	Ditto	Ditto	Ditto	Ditto	Ditto
199	False statement made in any declaration which is by law receivable as evidence	Ditto	Ditto	Ditto	Ditto	Ditto
200	Using as true any such declaration known to be false	Ditto	Ditto	Ditto	Ditto	Ditto
201	Causing disappearance of evidence of an offence committed or giving false information touching it to screen the offender, if a capital offence	Ditto	Ditto	Ditto	Imprisoned for 7 years and fine	Ct of Ses
	If punishable with transportation for life or imprisonment for 10 years	Ditto	Ditto	Ditto	Imprisoned for 3 years, and fine	Ct of Ses, P Mag, or Mag 1st class.
	If punishable with less than 10 years imprisonment	Ditto	Ditto	Ditto	Imprisoned for the long term, provided for the offence, or fine, or both	P Mag, or Mag 1st class, or Ct by which the offence is triable
202	Intentional omission to give information of an offence by a person legally bound to inform	Ditto	Ditto	Ditto	Imprisoned for 6 months, or fine or both	P Mag or Mag 1st or 2nd class.

	1	2	3	4	5	6	7	8
		Offence	Cognizable or not.	Warrant or summons	Bailable or not	Com poundable or not	Punishment under the I P. C.	By what Court triable
203		Giving false information respecting an offence committed	Not Cog	Warrant	Bailable	Not Com	Imprisoned for 2 years or fine, or both.	P Mag, or Mag 1st or 2nd class
204		Secreting, or destroying any document to prevent its production as evidence	Ditto ..	Ditto .	Ditto ..	Ditto ..	Ditto	P Mag, or Mag 1st class
205		False personation for the purpose of any act or proceeding in a suit or criminal prosecution, or for becoming bail or security	Ditto	Ditto .	Ditto ..	Ditto	Imprisoned for 3 years, or fine, or both	Ct of Ses, P Mag, or Mag 1st class
206		Fraudulent removal or concealment, etc., of property to prevent its seizure as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree	Ditto ...	Ditto ..	Ditto .	Ditto	Imprisoned for 2 years, or fine, or both	P Mag, or Mag 1st or 2nd class
207		Claiming property without right, or practising deception touching any right in it to prevent its being taken as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree	Ditto	Ditto	Ditto ..	Ditto	Ditto	Ditto

208	Fraudulently suffering a decree to pass for sum not due, or suffering decree to be executed after it has been satisfied	Ditto	..	Ditto	..	Ditto	..	Ditto	..	P Mag or Mag. of the 1st class
209	False claim in a Court of Justice	Ditto	..	Ditto	..	Ditto	..	Imp e d for 2 years and fine	P Mag, or Mag. 1st class	
210	Fraudulently obtaining a decree for a sum not due, or causing a decree to be executed after it has been satisfied	Ditto	..	Ditto	..	Ditto	..	Imp e d. for 2 years, or fine, or both.	Ditto	
211	False charge of offence made with intent to injure	Ditto	..	Ditto	..	Ditto	..	Ditto	..	Ditto
	If offences charged be punishable with imprisonment for 7 years or upwards.	Ditto	..	Ditto	..	Ditto	..	Imp e d for 7 years, or fine, or both	Ct of Ses, P. Mag, or Mag 1st class.	
	If offence charged be capital, or punishable with transportation for life	Ditto	..	Ditto	..	Ditto	..	Ditto	..	Ct of Ses
212	Harbours an offender, if the offence be capital	Cog	..	Ditto	..	Ditto	..	Imp e d for 5 years and fine	Ct of Ses, P. Mag, or Mag 1st class	
	If punishable with transportation for life or with imprisonment for 10 years	Ditto	..	Ditto	..	Ditto	..	Imp e d for 3 years and fine	Ditto	
	If punishable with imprisonment for 1 year and not for 10 years	Ditto	..	Ditto	..	Ditto	..	$\frac{1}{2}$ Imp of the longest term, provided for the offence, or fine, or both.	P Mag, or Mag 1st class, or Ct. by which the offence is triable	

1	2	3	4	5	6	7	8
Section.	Offence	Cognizable or not	Warrant or summons	Bailable or not	Com- poundable or not	Punishment under the I. P. C.	By what Court triable
203	Giving false information re- specting, in offence com- mitted	Not Cog	Warrant	Bailable	Not Com	Imprisoned for 2 years or fine, or both,	P Mag, or Mag 1st or 2nd class
204	Secreting, or destroying any document to prevent its production as evidence	Ditto	Ditto	Ditto	Ditto	Ditto	P Mag, or Mag 1st class
205	False personation for the purpose of any act or pro- ceeding in a suit or crimi- nal prosecution, or for becoming bail or secu- rity	Ditto	Ditto	Ditto	Ditto	Imprisoned for 3 years or fine, or both	Ct of Ses, P Mag, or Mag 1st class
206	Fraudulent removal or con- cealment, etc., of property to prevent its seizure as a forfeiture or in satisfaction of a fine under sentence, or in execution of a decree	Ditto	Ditto	Ditto	Ditto	Imprisoned for 2 years, or fine, or both	P Mag, or Mag 1st or 2nd class
207	Claiming property without right, or practising decep- tion touching any right to it to prevent its being taken as a forfeiture or in satisfaction of a fine under sentence, or in execution of a decree	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

208	Fraudulently suffering a decree to pass for sum not due, or suffering decree to be executed after it has been satisfied	Ditto	..	Ditto	..	Ditto	...	Ditto	..	..	P Mag or Mag. of the 1st class.
209	False claim in a Court of Justice.	Ditto	.	Ditto	...	Ditto	..	Ditto	...	Imp e d for 2 years and fine	P. Mag, or Mag. 1st class.
210	Fraudulently obtaining a decree for a sum not due, or causing a decree to be executed after it has been satisfied	Ditto	.	Ditto	..	Ditto	...	Ditto	..	Imp e d. for 2 years, or fine, or both.	Ditto
211	False charge of offence made with intent to injure	Ditto	..	Ditto	..	Ditto	...	Ditto	..	...	Ditto.
	If offences charged be punishable with imprisonment for 7 years or upwards.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imp e d. for 7 years, or fine, or both	Ct. of Ses, P. Mag, or Mag. 1st class.
	If offence charged be capital, or punishable with transportation for life	Ditto	..	Ditto	...	Ditto	...	Ditto	..	...	Ct of Ses
212	Harbours an offender, if the offence be capital	Cog	.	Ditto	...	Ditto	...	Ditto	...	Imp e d for 5 years and fine	Ct. of Ses, P. Mag, or Mag. 1st class
	If punishable with transportation for life, or with imprisonment for 10 years	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imp e d for 3 years and fine	Ditto
	If punishable with imprisonment for 1 year and not for 10 years.	Ditto	...	Ditto	...	Ditto	...	Ditto	..	$\frac{1}{2}$ Imp of the longest term, provided for the offence, or fine, or both.	P. Mag, or Mag. 1st class, or Ct. by which the offence is triable.

Section.	1	2	3	4	5	6	7	8
		Offence	Cognizable or not.	Warrant or summons.	Bailable or not.	Com- poundable or not	Punishment under the I. P. C.	By what Court triable.
203		Giving false information re- specting an offence com- mitted	Not Cog.	Warrant	Bailable	Not Com.	Imp. e. d. for 2 years or fine, or both.	P. Mag, or Mag. 1st or 2nd class
204		Secreting or destroying any document to prevent its production as evidence	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ..	P Mag, or Mag. 1st class.
205		False personation for the purpose of any act or pro- ceeding in a suit or crimi- nal prosecution, or for becoming bail or secu- rity.	Ditto ...	Ditto ..	Ditto ...	Ditto ...	Imp. e. d. for 3 years, or fine, or both.	Ct. of Ses, P. Mag, or Mag. 1st class
206		Fraudulent removal or con- cealment, etc, of property to prevent its seizure as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imp. e. d. for 2 years, or fine, or both	P. Mag, or Mag 1st or 2nd class
207		Claiming property without right, or practising decep- tion touching any right in it, to prevent its being taken as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree.	Ditto ..	Ditto ...	Ditto ...	Ditto ..	Ditto ...	Ditto

		Ditto	Ditto	Ditto	Ditto	Ditto	P Mag or Mag of the 1st class
208	Fraudulently suffering a decree to pass for sum not due, or suffering decree to be executed after it has been satisfied	Ditto	Ditto	Ditto	Ditto	Ditto	P Mag, or Mag, 1st class
209	False claim in a Court of Justice	Ditto	Ditto	Ditto	Ditto	Ditto	P Mag, or Mag, 1st class
210	Fraudulently obtaining a decree for a sum not due, or causing a decree to be executed after it has been satisfied	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
211	False charge of offence made with intent to injure If offences charged be punishable with imprisonment for 7 years or upwards	Ditto	Ditto	Ditto	Ditto	Ditto	Ct of Ses, P. Mag, or Mag 1st class
212	If offence charged be capital, or punishable with transportation for life Harbouring an offender, if the offence be capital	Ditto	Ditto	Ditto	Ditto	Ditto	Ct of Ses
	If punishable with transportation for life or with imprisonment for 10 years	Ditto	Ditto	Ditto	Ditto	Ditto	Ct of Ses, P. Mag, or Mag 1st class
	If punishable with imprisonment for 1 year and not for 10 years	Ditto	Ditto	Ditto	Ditto	Ditto	P Mag, or Mag 1st class, or Ct by which the offence is triable

Section.

1	2	3	4	5	6	7	8
	Offences,	Cognizable Warrant or not.	Warrant summons.	Bailable or not.	Com-poundable* or not.	Punishment under the I P C.	By what Court triable.
213	Taking gift, etc, to screen an offender from punishment, if the offence be capital If punishable with transportation for life, or with imprisonment for 10 years.	Not Cog.	Warrant	Bailable	Not Com.	Imp e. d. for 7 years, and fine	Ct of Ses
		Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imp. e d for 3 years, and fine.	Ct of Ses. P. Mag, or Mag. 1st class
	If with imprisonment for less than 10 years	Ditto ...	Ditto ...	Ditto ...	Ditto ...	$\frac{1}{2}$ Imp of the longest term, provided for the offence, or fine, or both	P Mag. or Mag, 1st class, or Ct by which the offence is triable.
214	Offering gift or restoration of property in consideration of screening offender, if the offence be capital. If punishable with transportation for life, or with imprisonment for 10 years.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imp e d for 7 years, and fine.	Ct of Ses
		Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imp e d for 3 years, and fine	Ct. of Ses, P. Mag, or Mag. 1st class.
	If with imprisonment for less than 10 years	Ditto ...	Ditto ...	Ditto ...	Ditto ...	$\frac{1}{2}$ Imp. of the longest term, provided for the offence, or fine, or both.	P. Mag, or Mag. 1st class, or Ct by which the offence is triable

215	Taking gift to help to recover moveable property of which a person has been deprived by an offence, without causing apprehension of offender	Ditto	Ditto	Ditto	Ditto	Imp e d for 2 years or fine or both	P Mg, or 1st class
216	Harbouring an offender who has escaped from custody, or whose apprehension has been ordered, if the offence capital If punishable with transportation for life, or with imprisonment for 10 years If with imprisonment for 1 year, and not for 10 years	Cok	Ditto	Ditto	Ditto	Imp e d for 7 years and fine	Ct of Ses, P Mg, or 1st class
		Ditto	Ditto	Ditto	Ditto	Imp e d for 3 years, with or without fine	Ditto
		Ditto	Ditto	Ditto	Ditto	Imp of the long est term provided for the offence, or fine, or both	P Mg, or 1st class, or Ct by which the offence is triable
216A	Harbouring robbers or dacoits	Ditto	Ditto	Ditto	Ditto	R l for 7 years and fine	Ct of Ses, P Mg, or 1st class
217	Public servant disobeying a direction of law with intent to save person from punishment or property from forfeiture	Not Cog	Summons	Ditto	Ditto	Imp e d for 2 years, or fine, or both	1 Mg, or 1st or 2nd class
218	Public servant framing an incorrect record or writing with intent to save person from punishment or property from forfeiture	Ditto	Warrant	Ditto	Ditto	Imp e d for 3 years, or fine or both	Ct of Ses

Section.	1	2	3	4	5	6	7	8
		Offences	Cognizable or not.	Warrant or summons.	Bailable or not.	Com- poundable or not	Punishment under the I P. C	By what Court triable.
219		Public servant in a judicial proceeding corruptly making and pronouncing an order, report, verdict or decision which he knows to be contrary to law	Not Cog.	Warrant	Bailable	Not Com	Imprisoned for 7 years or fine, or both	Ct. of Ses.
220		Commitment for trial or confinement by a person having authority who knows that he is acting contrary to law	Ditto ...	Ditto ..	Ditto ...	Ditto ...	Ditto ...	Ditto
221		Intent on omission to apprehend on the part of a public servant bound by law to apprehend an offender, if the offence be capital	Ditto ...	Ditto ..	Ditto	Ditto ...	Imprisoned for 7 years, with or without fine	Ditto.
		If punishable with transportation for life, or imprisonment for 10 years	Ditto ..	Ditto ..	Ditto ...	Ditto ...	Imprisoned for 3 years, with or without fine	Ct. of Ses, P. Mag, or Mag 1st class,
		If with imprisonment for less than 10 years	Ditto ...	Ditto ..	Ditto ..	Ditto ...	Imprisoned for 2 years, with or without fine	P Mag or Mag. 1st or 2nd class.

222	Intentional omission to apprehend on the part of a public servant bound by law to apprehend person under sentence of Court of Justice if under sentence of death If under sentence of transportation or penal servitude for life, or transportation, imprisonment or penal servitude for 10 years or upwards If under sentence of imprisonment for less than 10 years or lawfully committed to custody	Ditto	Ditto	Not B	Ditto	Trans for life, or imprisoned for 14 years, with or without fine	Ct of Ses
		Ditto	Ditto	Ditto	Ditto	Impr e d for 7 years, with or without fine	Ditto
		Ditto	Ditto	Not B	Ditto	Impr e d for 3 years, or fine or both	Ct of Ses, p Mag or Mag 1st class
223	Escape from confinement negligently suffered by a public servant	Ditto	Summons	Ditto	Ditto	S 1 for 2 years, or fine, or both	p Mag, or Mag 1st or 2nd class
224	Resistance or obstruction by a person to his lawful apprehension	Cog	Warrant	Ditto	Ditto	Impr e d for 2 years, or fine, or both	Ditto
225	Resistance or obstruction to the lawful apprehension of another person, or rescuing him from lawful custody If charged with an offence punishable with transportation for life or imprisonment for 10 years If charged with a capital offence	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
		Ditto	Ditto	Not B	Ditto	Impr e d for 3 years, and fine	Ct of Ses, p Mag or Mag 1st class
		Ditto	Ditto	Ditto	Ditto	Impr e d for 7 years, and fine	Ct of Ses

Offence	Cognizable or not	Warrant or summons	Bailable or not	Compoundable or not	Punishment under the I P C	By what Court triable
If the person is sentenced to transportation for life, or to transportation penal servitude or imprisonment for 10 years or upwards	Cog	Warrant	Not B...	Not Com	Imprisoned for 7 years, and fine	Ct of Ses
If under sentence of death	Ditto	Ditto	Ditto	Ditto	Trans for life, or imprisoned for 10 years, and fine	Ditto
25 A Omission to apprehend, or sufferance of escape, on part of public servant, in cases not otherwise provided for— (1) in case of intentional omission or sufferance , (2) in case of negligent omission or sufferance	Not Cog	Ditto	Bailable	Ditto	Imprisoned for 3 years, or fine, or both	Ct of Ses P Mag or Mag 1st class
	Ditto	Summons	Ditto	Ditto	S I for 2 years or fine, or both	P Mag or Mag 1st or 2nd class
25 B Resistance or obstruction to lawful apprehension, or escape or rescue in case not otherwise provided for	Cog	Warrant	Ditto	Ditto	Imprisoned for 6 months, or fine, or both	Ditto
26 1 Unlawful return from trans portation	Ditto	Ditto	Not B	Ditto	Trans for life, and fine and 10 yrs imp for 3 years before trans	Ct of Ses

	Violaton of condition of re mission of a punishment	Not Cog	Summonds	Ditto	Punishment of original sentence, or if part of the punishment has been undergone, the residue	The Ct by which the original of ence was triable
227						
228	Intentional insult or interruption to a public servant sitting in any stage of judicial proceeding	Ditto	Ditto	Ditto	Imp e d for 2 yearss, or fine, or both	Ct in which offence is committed, sub ject to provisions of Ch XXV
229	Personation of a juror or assessor	Ditto	Ditto	Ditto	Imp e d for 2 yearss, or fine, or both	P Mag or Mag 1st class

STAMPS

	Warrant	Not B	Not Com	Imp e d for 7 years, and fine	Ditto
230					

CHAPTER VII—OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS

	Counterfeiting, or performing any part of the process of counterfeiting coin	Ditto	Ditto	Trans for 1 fe, or imp e d for 10 years, and fine	Ct of Ses, P
231					
232	Counterfeiting or performing any part of the process of counterfeiting, the Queen's coin	Ditto	Ditto	Imp e d for 3 years, and fine	Ct of Ses, P
233	Making, buying or selling instrument for the purpose of counterfeiting coin	Ditto	Ditto	Imp e d for 7 years, and fine	Mag or Mag 1st class
234	Making, buying or selling instrument for the purpose of counterfeiting the Queen's coin	Ditto	Ditto	Imp e d for 3 years, and fine	Ct of Ses, P
235	Possession of instrument or material for the purpose of using the same for counterfeiting coin	Ditto	Ditto	Imp e d for 10 years, and fine	Ct of Ses
	if Queen's coin				

	1	2	3	4	5	6	7	8
		Offence	Cognizable or not.	Warrant or summons.	Bailable or not	Com- poundable or not	Punishment under the I. P. C.	By what Court triable.
236	Abetting in British India the counterfeiting out of British India of coin	Cog. ...	Warrant	Not B ...	Not Com.		The punishment pro- vided for abetting the counterfeiting of such coin within British India	Ct. of Ses.
237	Import or export of counter- feit coin, knowing the same to be counterfeit	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ..	Imp e d for 3 years and fine	Ct. of Ses, P. Mag or Mag 1st class
238	Import or export of counter- feits of the Queen's coin, knowing the same to be counterfeit	Ditto ..	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Trans for life, or Imp e d for 10 years and fine	Ct of Ses
239	Having any counterfeit coin known to be such when it came into possession and delivering, etc., the same to any person	Ditto .	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imp e d for 5 years and fine	Ct of Ses, P. Mag or Mag. 1st class
240	The same with respect to the Queen's coin	Ditto ..	Dit o ..	Ditto ..	Ditto ..	Ditto ...	Imp e d for 10 years and fine	Ditto
241	Knowingly delivering to an- other any counterfeit coin as genuine which, when first possessed, the deli- verer did not know to be counterfeit	Ditto ..	Ditto ..	Ditto ..	Ditto ...	Ditto ...	Imp e d for 2 years, or fine of 10 times the value of the coin counterfeited, or both	P Mag, or Mag. 1st or 2nd class.

		Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imp. e. d. for 3 years and fine.	Ct. of Ses., P. Mag., or Mag. 1st class.
242	Possession of counterfeit coin by a person who knew it to be counterfeit when he became possessed thereof	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imp. e. d. for 3 years and fine.	Ct. of Ses., P. Mag., or Mag. 1st class.
243	Possession of Queen's coin by a person who knew it to be counterfeit when he became possessed thereof	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imp. e. d. for 7 years and fine	Ditto.
244	Person employed in a Mint causing coin to be of a different weight or composition from that fixed by law.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto	Ct. of Ses
245	Unlawfully taking from a Mint any coming instrument	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto	Ditto.
246	Fraudulently diminishing the weight or altering the composition of any coin	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imp. e. d. for 3 years and fine.	Ct. of Ses., P. Mag., or Mag. 1st class.
247	Fraudulently diminishing the weight or altering the composition of the Queen's coin	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imp. e. d. for 7 years and fine	Ditto
248	Altering appearance of any coin with intent that it shall pass as a coin of a different description	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imp. e. d. for 3 years and fine	Ditto
249	Altering appearance of the Queen's coin with intent that it shall pass as a coin of a different description	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imp. e. d. for 7 years and fine	Ditto

Section.	Offence	Cognizable Warrant or or not. summons.	Bailable or not.	Com- poundable or not.	Punishment under the 1 P C.	By what Court triable.	
250	Delivery to another of coin possessed with the know- ledge that it is altered.	Cog. .. Warrant	Not B. ...	Not com.	Imp e d for 5 years and fine	Ct. of Ses., P. Mag., or Mag. 1st class.	
251	Delivery of Queen's coin possessed with the know- ledge that it is altered	Ditto ...	Ditto ...	Ditto ...	Imp e d. for 10 years and fine.	Ditto	
252	Possession of altered coin by a person who knew it to be altered when he be- came possessed thereof	Ditto .	Ditto ...	Ditto ...	Imp e d. for 3 years and fine.	Ditto	
253	Possession of Queen's coin by a person who knew it to be altered when he be- came possessed thereof	Ditto ..	Ditto ...	Ditto ...	Imp e d. for 5 years and fine.	Ditto.	
254	Delivery to another of coin as genuine which, when first possessed, the deli- verer did not know to be altered	Ditto ..	Ditto ...	Ditto ...	Imp e d for 2 years, or fine of ten times the value of the coin	P. Mag., or Mag. 1st or 2nd class.	
255	Counterfeiting a Govern- ment stamp	Ditto ..	Ditto ...	Bailable	Ditto ...	Trans for life, or imp. e. d for 10 years and fine.	Ct of Ses.
256	Having possession of an in- strument or material for the purpose of counterfeit- ing a Government stamp	Ditto ...	Ditto ...	Ditto ...	Imp e d for 7 years and fine	Ditto.	

257	Making, buying or selling instrument for the purpose of counterfeiting a Government stamp	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto
258	Sale of counterfeit Government stamp	Ditto	..	Ditto	..	Ditto	...	Ditto	...	Ditto.
259	Having possession of a counterfeit Government stamp	Ditto	...	Ditto	...	Ditto	..	Ditto	...	Ct. of Ses. P. Mag. or Mag. first class.
260	Using as genuine a Government stamp known to be counterfeit	Ditto	..	Ditto	...	Ditto	...	Ditto	...	Imp. e d for 7 years, or fine, or both.
261	Effacing any writing from a substance bearing a Government stamp, or removing from a document a stamp used for it with intent to cause loss to Government	Ditto	..	Ditto	..	Ditto	...	Ditto	...	Imp e d. for 3 years, or fine, or both.
262	Using a Government stamp known to have been before used	Ditto	..	Ditto	...	Ditto	...	Ditto	...	Imp. e d for 2 years, or fine, or both.
263	Eraseure of mark denoting that stamp has been used	Ditto		Ditto	..	Ditto	...	Ditto	...	Imp. e d for 3 years, or fine, or both.
263-A	Fictitious stamps	Ditto	.	Ditto	..	Ditto	...	Ditto	..	Imp. e d for 200 rupees
										P. Mag or. Mag. first class.

CHAPTER XIII.—OFFENCES RELATING TO WEIGHTS AND MEASURES.

264	Fraudulent use of false instrument for weighing	Not Cog.	Summons	Bailable	Not Com	Imp. e d. for 1 year, or fine, or both	P. Mag. or Mag. first or second class.
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Section.	Offence	Cognizable Warrant or or not.	Bailable or not.	Com- poundable or not.	Punishment under the I, P C	By what Court triable.
265	Fraudulent use of false weight or measure,	Not Cog.	Bailable	Not com.	Imp e d for 1 year, or fine, or both.	P Mag, or Mag 1st or 2nd class.
266	Being in possession of false weights or measures for fraudulent use	Ditto ...	Ditto ..	Ditto ...	Ditto ...	Ditto,
267	Making or selling false weights or measures for fraudulent use	Ditto ...	Ditto ...	Ditto ...	Ditto	Ditto
269	Negligently doing any act known to be likely to spread infection of any disease dangerous to life	Cog ...	Bailable	Not Com	Imp e d for 6 months, or fine or both	P. Mag, or Mag. 1st or 2nd class.
270	Malignantly doing any act known to be likely to spread infection of any disease dangerous to life.	Ditto ...	Ditto ...	Ditto ...	Imp e d. for 2 years, or fine, or both	Ditto
271	Knowingly disobeying any quarantine rule	Not Cog.	Ditto ...	Ditto ...	Imp e d for 6 months, or fine, or both	Ditto.
272	Adulterating food or drink intended for sale, so as to make the same noxious.	Ditto ...	Ditto ...	Ditto ...	Imp e d for 6 months, or fine of 1,000 rupees, or both	P. Mag, or Mag. 1st or 2nd class

CHAPTER XIV.—OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS.

CHAPTER XIV.—OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS.

273	Selling any food or drink as food or drink, knowing the same to be noxious	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto
274	Adulterating any drug or medical preparation intended for sale so as to lessen its efficacy, or to change its operation, or to make it noxious	Ditto ..	Ditto ..	Ditto ..	Ditto ..	Ditto
275	Offering for sale or issuing from a dispensary any drug or medical preparation known to have been adulterated	Ditto ..	Ditto ..	Ditto ..	Ditto ..	Ditto
276	Knowingly selling or issuing from a dispensary any drug or medical preparation as a different drug or medical preparation	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto.
277	Defiling the water of a public spring or reservoir	Cog ..	Ditto ..	Ditto ...	Ditto ..	Imprisoned for 3 months, or fine of 500 rupees, or both.
278	Making atmosphere noxious to health	No Cog	Ditto ..	Ditto ...	Ditto ..	Fine of 500 rupees ... D. 10.
279	Driving or riding on a public way so rashly or negligently as to endanger human life, etc	Cog ...	Ditto ...	Ditto ..	Ditto ..	Imprisoned for 6 months, or fine of 1,000 rupees or both
280	Navigating any vessel so rashly or negligently as to endanger human life etc	Ditto ...	Ditto ..	Ditto ...	Ditto ..	P. Mag. or Mag. 1st or 2nd class
281	Exhibition of a false light, mark or buoy.	Ditto ...	Warrant	Ditto ...	Ditto ..	Imprisoned for 7 years, or fine, or both

Section.	1	2	3	4	5	6	7	8
		Offence	Cognizable or not.	Warrant or summons	Bailable or not	Com- poundable or not	Punishment under the I. P. C.	By what Court triable,
282		Conveying for hire any person by water, in a vessel in such a state, or so loaded, as to endanger his life	Cog ...	Summons	Bailable	Not com.	Imprisoned for 6 months, or fine of 1,000 rupees, or both	P. Mag., or Mag. 1st or 2nd class.
283		Causing danger, obstruction or injury in any public way or line of navigation	Ditto ...	Ditto ...	Ditto ...	Ditto ..	Fine of 200 rupees ...	Ditto
284		Dealing with any poisonous substance so as to endanger human life, etc.	Not Cog	Ditto ...	Ditto ...	Ditto ...	Imprisoned for 6 months, or fine of 1,000 rupees, or both.	Ditto
285		Dealing with fire or any combustible matter so as to endanger human life, etc.	Cog. ...	Ditto ..	Ditto ...	Ditto ...	Ditto ...	Any Mag.
286		So dealing with any explosive substance	Ditto ...	Ditto ...	Ditto ...	Ditto .	Ditto ..	Ditto
287		So dealing with any machinery.	Not Cog.	Ditto ...	Ditto ..	Ditto .	Ditto ..	P. Mag., or Mag. 1st or 2nd class
288		A person omitting to guard against probable danger to human life by the fall of any building over which he has a right entitling him to pull it down or repair it	Ditto ...	Ditto ...	Ditto ...	Ditto ..	Ditto ..	Ditto

289	A person omitting to take order with any animal in his possession, so as to guard against danger to human life, or of grievous hurt, from such animal	Cog. ...	Ditto ...	Ditto ...	Ditto ...	Imp e d for 6 months, or fine of 1,000 rupees, or both	Any Mag.
290	Committing a public nuisance.	Not Cog	Ditto	Ditto	Ditto	Fine of 200 rupees	Ditto
291	Continuance of nuisance after injunction to discontinue.	Cog. ...	Ditto ...	Ditto ...	Ditto ...	S 1 for 6 months, or fine or both	P. Mag, or Mag. 1st or 2nd class
292	Sale, etc., of obscene books, etc	Ditto ..	Warrant	Ditto	Ditto	Imp e d for 3 months, or fine, or both	Ditto
293	Having in possession obscene books, etc., for sale or exhibition	Ditto ...	Ditto	Ditto	Ditto	Ditto ..	Ditto
294	Obscene Songs	Ditto ...	Ditto ...	Ditto ...	Ditto	Ditto	Ditto.
294-A	Keeping a lottery office	Not Cog	Summons	Ditto	Ditto	Imp e d for 6 months, or fine, or both.	Any Mag.
	Publishing proposals relating to lotteries	Ditto	Ditto	Ditto	Ditto	Fine of 1,000 rupees.	Ditto
CHAPTER XV—OFFENCES RELATING TO RELIGION.							
295	Destroying, damaging or defiling a place of worship or sacred object with intent to insult the religion of any class of persons	Cog	Summons	Bailable	Not Com	Imp e d. for 2 years, or fine, or both.	P. Mag. or Mag. 1st or 2nd class.
296	Causing a disturbance to an assembly engaged in religious worship.	Ditto	Ditto	Ditto	Ditto	Imp e d for 1 year, or fine, or both.	Ditto

Section.	1	2	3	4	5	6	7	8
		Offence	Cognizable or not.	Warrant or summons.	Bailable or not.	Com- poundable or not	Punishment under the I. P. C.	By what Court triable.
282		Conveying for hire any person by water, in a vessel in such a state, or so loaded, as to endanger his life.	Cog. ...	Summons	Bailable	Not com.	Imp e d for 6 months, or fine of 1,000 rupees, or both	P. Mag., or Mag. 1st or 2nd class.
283		Causing danger, obstruction or injury in any public way or line or navigation.	Ditto ...	Ditto ...	Ditto ...	Ditto ..	Fine of 200 rupees ...	Ditto
284		Dealing with any poisonous substance so as to endanger human life, etc.	Not Cog	Ditto ...	Ditto ...	Ditto ...	Imp e d for 6 months, or fine of 1,000 rupees, or both.	Ditto
285		Dealing with fire or any combustible matter so as to endanger human life, etc.	Cog. ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Any Mag.
286		So dealing with any explosive substance	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto
287		So dealing with any machinery.	Not Cog.	Ditto ...	Ditto ...	Ditto ..	Ditto ...	P, Mag., or Mag. 1st or 2d class.
288		A person omitting to guard against probable danger to human life by the fall of any building over which he has a right entitling him to pull it down or repair it	Ditto ...	Ditto ...	Ditto ...	Ditto ..	Ditto ...	Ditto

289	A person omitting to take order with any animal in his possession, so as to guard against danger to human life, or of grievous hurt, from such animal	Cog. ...	Ditto ...	Ditto ...	Ditto ...	Imp e d for 6 months, or fine of 1,000 rupees, or both	Any Mag.
290	Committing a public nuisance.	Not Cog.	Ditto ..	Ditto ...	Ditto ...	Fine of 200 rupees ...	Ditto.
291	Continuance of nuisance after injunction to discontinue.	Cog. ...	Ditto ...	Ditto ...	Ditto ...	S l for 6 months, or fine or both	P. Mag. or Mag. 1st or 2nd class.
292	Sale, etc., of obscene books, etc	Ditto ...	Warrant	Ditto .	Ditto ..	Imp e d for 3 months, or fine, or both.	Ditto.
293	Having in possession obscene books, etc., for sale or exhibition	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ..	Ditto.
294	Obscene Songs	Ditto ...	Ditto ...	Ditto ...	Ditto ..	Ditto .	Ditto.
294-A	Keeping a lottery office	Not Cog	Summons	Ditto ...	Ditto ...	Imp e d for 6 months, or fine, or both.	Any Mag.
	Publishing proposals relating to lotteries	Ditto ...	Ditto ..	Ditto ...	Ditto ...	Fine of 1,000 rupees...	Ditto.

CHAPTER XV.—OFFENCES RELATING TO RELIGION.

295	Destroying, damaging or defiling a place of worship or sacred object with intent to insult the religion of any class of persons	Cog ...	Summons	Bailable	Not Com	Imp e d for 2 years, or fine, or both.	P. Mag. or Mag. 1st or 2nd class.
296	Causing a disturbance to an assembly engaged in religious worship.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imp e d for 1 year, or fine, or both.	Ditto

Section.	Offence	Cognizable Warrant or or not, summons	Bailable or not	Com- poundable or not	Punishment under the I. P. C.	By what Court triable
297	Trespassing in place of wor- ship or sepulchre, disturb- ing funeral, with intention to wound the feelings or to insult the religion of any person, or offering indig- nity to a human corpse	Cog ...	Summons Bailable	Not Com.	Imp e d for 1 year, or fine, or both.	P Mag, or Mag- 1st or 2nd class
298	Uttering any word or mak- ing any sound in the hear- ing, or making any gesture, or placing any object in the sight of any person, with intention to wound his religious feeling	Not Cog.	Ditto ...	Ditto . Com. ...	Ditto ..	Ditto
<p>CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY.</p> <p><i>Of Offences Affecting Life</i></p>						
302	Murder	Cog	Warrant	Not B ..	Not Com	Death, or trans for life, Ct. of Ses.
303	Murder by a person under sentence of transportation for life	Ditto ...	Ditto ...	Ditto ...	Ditto . and fine Ditto .	Ditto

CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY.

Of Offences Affecting Life

304	Culpable homicide not amounting to murder, if act by which the death is caused is done with intention of causing death, &c If act is done with knowledge that it is likely to cause death, but without any intention to cause death, &c.	Ditto	..	Ditto	...	Ditto	...	Ditto	...	Trans for life or imp e d for 10 years and fine	Ct. of Ses.
		Ditto	..	Ditto	...	Ditto	...	Ditto	..	Imp e d for 10 years or fine, or both.	Ditto.
304-A	Causing death by rash or negligent act	Ditto	..	Ditto	..	Bailable	Ditto	..	Ditto	Imp e d for 2 years, or fine, or both	Ct. of Ses, P. Mag or Mag. 1st class
305	Abetment of suicide committed by a child, or in same, or delinquent person, or an idiot, or a person intoxicated	Ditto	..	Ditto	..	Not B...	Ditto	..	Ditto	Death, or trans for life or imp for 10 years and fine	Ct. of Ses
306	Abetting the commission of suicide	Ditto	..	Ditto	..	Ditto	..	Ditto	..	Imp e d for 10 years, or fine, or both	Ditto
307	Attempt to murder If such act cause hurt to any person.	Ditto	..	Ditto	..	Ditto	..	Ditto	...	Ditto ...	Ditto.
	Attempt by life convict to murder, if hurt is caused	Ditto	..	Ditto	..	Ditto	..	Ditto	..	Trans for life, or as above	Ditto
308	Attempt to commit culpable homicide	Ditto	..	Ditto	..	Bailable	Ditto	..	Ditto	Imp e d. for 3 years, or fine, or both	Ditto.
	If such act cause hurt to any person	Ditto	..	Ditto	..	Ditto	..	Ditto	..	Imp e d for 7 years, or fine or both	Ditto
309	Attempt to commit suicide	Ditto	..	Ditto	..	Ditto	..	Ditto	...	S I for 1 year, or fine, or both.	P Mag. or Mag. 1st or 2nd class
511	Being a thug	Ditto	..	Ditto	..	Not B...	Ditto	..	Ditto	Trans for life, and fine.	Ct. of Ses

Section.

Offence.	Cognizable Warrant or or not summons.	Bailable or not.	Com- poundable or not.	Punishment under the I P C.	By what Court triable.
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Of the Causing of Miscarriage, of Injuries to Unborn Children, of the Exposure of Infants; and of the Concealment of Births.

312	Causing miscarriage	Not Cog.	Warrant	Bailable	Not Com.	Imp e d for 3 years and fine	Ct. of Ses
	If the woman be quick with child.	Ditto ..	Ditto ...	Ditto ...	Ditto ...	Imp e d for 7 years and fine	Ditto
313	Causing miscarriage without woman's consent.	Ditto ..	Ditto ..	Not B...	Ditto ...	Trans f r life, or Imp e d for 10 years, and fine.	Ditto
314	Death caused by an act done with intent to cause miscarriage	Ditto ...	Ditto ..	Ditto ..	Ditto ...	Imp e d for 10 years and fine	Ditto.
	If act done without woman's consent.	Ditto ...	Ditto ..	Ditto ...	Ditto ...	Trans for life, or as above	Ditto.
315	Act done with intent to prevent a child being born alive, or to cause it to die after its birth	Ditto ...	Ditto ...	Ditto ..	Ditto ...	Imp e d for 10 years, or fine or both.	Ditto
316	Causing death of a quick unborn child by an act amounting to culpable homicide.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imp e d for 10 years, and fine	Ditto.

317	Exposure of a child under 12 years of age by parent of person having care of it with intention of wholly abandoning it	Cog.	Ditto	Detable	Ditto	Imprisoned for 7 years, or fine or both	Ditto
318	Concealment of birth by secret disposal of dead body	Ditto	Ditto	Ditto	Ditto	Imprisoned for 2 years, or fine, or both	Ct. of Ses., P. Mag., or Mag. 1st or 2nd class

Of Hurt

323	Voluntarily causing hurt	Not Cog	Summons	Ditto	Com	Imprisoned for 1 year, or fine or both	Any Mag
324	Voluntarily causing hurt by dangerous weapons or means	Cog	Ditto	Ditto	Com with permission of Court	Imprisoned for 3 years or fine or both	Ct. of Ses., P. Mag., or Mag. 1st or 2nd class
325	Voluntarily causing grievous hurt	Ditto	Ditto	Ditto	Ditto	Imprisoned for 7 years, or fine	Ditto
326	Voluntarily causing grievous hurt by dangerous weapons or means	Ditto	Ditto	Not B	Not Com	Trans for life or Imprisoned for 10 years and fine	Ct. of Ses., P. Mag., or Mag. 1st class
327	Voluntarily causing hurt to extent property or a valuable security, or to constrain to do anything which is illegal or which may facilitate the commission of an offence	Ditto	Warrant	Ditto	Ditto	Imprisoned for 10 years, and fine	Ct. of Ses.
328	Administering stupefying drug with intent to cause hurt, etc	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

Section.	1	2	3	4	5	6	7	8
		Offences	Cognizable or not	Warrant or summons	Bailable or not	Com- poundable or not	Punishment under the I P C	By what Court triable
329		Voluntarily causing grievous hurt to extort property or valuable security, or to constrain to do anything which is illegal or which may facilitate the commission of an offence	Cog	Warrant	Not B	Not Com	Trans for life, or Imp e d for 10 years and fine	Ct of Ses
330		Voluntarily causing hurt to extort confession or information, or to compel restoration of property, etc	Ditto	Ditto	Bailable	Ditto	Imp e d for 7 years and fine	Ditto
331		Voluntarily causing grievous hurt to extort confession or information or to compel restoration of property, etc	Ditto	Ditto	Not B	Ditto	Imp e d for 10 years and fine	Ditto
332		Voluntarily causing hurt to deter public servant from his duty	Ditto	Ditto	Bailable	Ditto	Imp e d for 3 years or fine, or both	Ct of Ses Mag or Mag 1st class
333		Voluntarily causing grievous hurt to deter public servant from his duty	Ditto	Ditto	Not B	Ditto	Imp e d for 10 years and fine	Ct of Ses

334	Voluntarily causing hurt on grave and sudden provocation, not intending to hurt any other than the person who gave the provocation	Not Cog	Summons	Bailable	Com. ...	imp e d for 1 month, or fine of 500 rupees, or both.	Any Mag.
335	Causing grievous hurt on grave and sudden provocation, not intending to hurt any other than the persons who gave the provocation	Cog	...	Ditto ..	Otto ..	Com with imp e d for 4 years, or fine, or both	Ct. of Ses, P. Mag, or Mag. 1st or 2nd class
336	Doing any act which endangers human life or the personal safety of others	Ditto	...	Ditto	...	Not Com	Any Mag
337	Causing hurt by an act which endangers human life, etc.	Ditto	..	Ditto	..	Com with imp e d for 6 months or fine, or both.	P. Mag, or Mag. 1st or 2nd class
338	Causing grievous hurt by an act which endangers human life, etc	Ditto	.	Ditto	..	Ditto ..	Ditto

Of Wrongful Restraint and Wrongful Confinement.

341	Wrongfully restraining any person	Cog	Summons	Bailable	Com	S l for 1 month, or fine, or both	Any Mag.
342	Wrongfully confining any person	Ditto	...	Ditto	..	Ditto	P. Mag, or Mag. 1st or 2nd class
343	Wrongfully confining for three or more days	Ditto	.	Ditto	...	Not Com	Ditto
344	Wrongfully confining for 10 or more days	Ditto	...	Ditto	...	Ditto ..	Ct of Ses, P. Mag. or Mag. 1st or 2nd class.

Section	1	2	3	4	5	6	7	8
		Offence	Cognizable or not	Warrant or summons	Bailable or not	Com- pou- dable or not	Punishment under the 1 P C	By what Court triable
345		Keeping any person in wrongful confinement, knowing that a writ has been issued for his liberation	Not Cog	Summons	Bailable	Not Com	Imprisoned for 3 years in addition to imprisonment under any other section	Ct of Ses, P Mag, or Mag 1st or 2nd class
346		Wrongful confinement in secret	Cog	Ditto	Ditto	Ditto	Ditto	Ditto
347		Wrongful confinement for the purpose of extorting property, or constraining to an illegal act, etc	Ditto	Ditto	Ditto	Ditto	Imprisoned for 3 years, and fine	Ditto
348		Wrongful confinement for the purpose of extorting confession or information, or of compelling restoration of property, etc	Ditto	Ditto	Ditto	Ditto	Ditto	Ct of Ses, P Mag, or Mag 1st class
<i>Of Criminal Force and Assault</i>								
352		Assault or use of criminal force otherwise than on grave provocation	Not Cog	Summons	Bailable	Com	Imprisoned for 3 months, or fine, or both	Any Mag
353		Assault or use of criminal force to compel a public servant from discharge of his duty	Cog	Warrant	Ditto	Not Com	Imprisoned for 2 years, or fine, or both	P Mag, or Mag 1st or 2nd class

354	Assault or use of criminal force on a woman with intent to outrage her modesty	Ditto	Ditto	Ditto	Ditto	Ditto
355	Assault or criminal force with intent to dishonour a person, with violence on grave and sudden provocation	Not Cog	Summons	Ditto	Com	Ditto
356	Assault or criminal force in attempt to commit theft of property worn or carried by a person	Cog	Warrant	Not B	Not Com	Any Mag
357	Assault or use of criminal force in attempt wrongfully to confine a person	Ditto	Ditto	Bailable	Ditto	Imprisoned for 1 year, or fine or both
358	Assault or use of criminal force on grave and sudden provocation	Not Cog	Summons	Ditto	Com	Imprisoned for 1 month, or fine or both
<i>Of Kidnapping, Abduction, Slavery and Forced Labour</i>						
363	Kidnapping	Cog	Warrant	Not B	Not Com	Imprisoned for 7 years, and fine Ct. of Ses., P. Mag., or Mag 1st class
364	Kidnapping or abducting in order to murder	Ditto	Ditto	Ditto	Ditto	Transferred for life, or imprisonment for 10 years, and fine Ct. of Ses
365	Kidnapping or abducting with intent to secretly and wrongfully to confine a person	Ditto	Ditto	Ditto	Ditto	Imprisoned for 7 years, and fine Ct. of Ses., P. Mag. or Mag 1st class.

Section.	Offence.	Cognizable or not	Warrant or summons	Bailable or not	Com- poundable or not	Punishment under the I P C.	By what Court triable.
366	Kidnapping or abducting a woman to compel her marriage or to cause her de- filement, etc	Cog	Warrant	Not B ...	Not Com.	Imp. e d. for 10 years, and fine	Ct. of Ses.
366 A	Procurement of minor girl	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
366 B	Importation of girl from foreign country	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
367	Kidnapping or abducting in order to subject a person to grievous hurt, slavery, etc	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
368	Concealing or keeping in confinement a kidnapped person	Ditto	Ditto	Ditto	Ditto	Punishment for kid- napping or abduc- tion.	Ditto.
369	Kidnapping or abducting a child with intent to take property from the person of such child	Ditto	Ditto	Ditto	Ditto	Imp e d for 7 years, and fine	Ct of Ses, P. Mag. or Mag 1st class
370	Buying or disposing of any person as a slave	Not Cog	Ditto	Bailable	Ditto	Ditto	Ct of Ses.
371	Habitual dealing in slaves	Cog.	Ditto	Not B....	Ditto	Trans for life, or imp e d for 10 years, and fine	Ditto.
372	Selling or letting to hire a minor for purposes of prostitution, etc	Ditto	Ditto	Ditto	Ditto	Imp e, d for 10 years, and fine.	Ct. of Ses, P. Mag, or Mag. 1st class.

373	Buying or obtaining possession of a minor for the same purposes	Ditto	Ditto	Ditto	Ditto	Ditto
374	Unlawful compulsory labour	Ditto	Ditto	Barable	Com	Imprisoned for 1 year, Any Mag or fine, or both
376	Rape— If the sexual intercourse was by a man with his own wife	Not Cog	Summons	Barable	Not Com	Trans for 1 fe or imp e d for 10 years and fine
377	In any other case. Unnatural offences	Cog Ditto	Warrant Ditto	Not B Ditto	Ditto Ditto	Ditto Trans for 1 fe, or imp e d for 10 years, and fine Ditto Ct of Ses, P Mag or Mag 1st class

CHAPTER XVII—OFFENCES AGAINST PROPERTY

Of Theft

379	Theft	Cog	Warrant	Not B	Not Com	Imprisoned for 3 years, or fine, or both
380	Theft in a building tent or vessel	Ditto	Ditto	Ditto	Ditto	Imprisoned for 7 years and fine
381	Theft by clerk or servant of property in possession of master or employer	Ditto	Ditto	Ditto	Ditto	Ditto
382	Theft preparatory on having been made for causing death or hurt or restraint or fear of death or of hurt, or of restraint in order to the committing of such theft or to retreating after committing it or to retaining property taken by it	Ditto	Ditto	Ditto	Ditto	Ct. of Ses, P Mag, or Mag 1st or 2nd class Ct. of Ses, P Mag or Mag 1st class

1 Section.	2 Offence	3 Cognizable or not	4 Warrant or summons	5 Bailable or not	6 Com- poundable or not	7 Punishment under the I P C	8 By what Court triable.
<i>Of Extortion</i>							
384	Extortion	Not Cog	Warrant	Bailable	Not com	Imprisoned for 3 years, or fine, or both.	Ct. of Ses., P. Mag., or Mag 1st or 2nd class
385	Putting or attempting to put in fear of injury, in order to commit extortion	Ditto	Ditto	Ditto	Ditto	Imprisoned for 2 years, or fine, or both	Ditto.
386	Extortion by putting a per- son in fear of death or grievous hurt	Ditto	Ditto	Not B	Ditto	Imprisoned for 10 years and fine	Ct of Ses
387	Putting or attempting to put a person in fear of death or grievous hurt, in order to commit extortion	Ditto	Ditto	Ditto	Ditto	Imprisoned for 7 years and fine	Ditto
388	Extortion by threat of accusation of an offence punishable with death, transportation for life, or imprisonment for 10 years	Ditto	Ditto	Bailable	Ditto	Imprisoned for 10 years and fine.	Ditto.
	If the offence threatened be an unnatural offence	Ditto	Ditto	Ditto	Ditto	Transportation for life	Ditto.

	Ditto ...	Ditto ...	Ditto ..	Ditto ..	Imp e d. for 10 years and fine.	Ct of Ses.
389	Putting a person in fear of accusation of offence punishable with death, trans. for life, or with imp for 10 years, in order to commit extortion	Ditto ...	Ditto ...	Ditto ...	Trans. for life	Ditto
	If the offence be an unnatural offence	Ditto ...	Ditto ...	Ditto ...	...	...
<i>Of Robbery and Dacoity.</i>						
392	Robbery	Cog. ...	Warrant	Not B ..	Notcom	Ct. of Ses, P Mag, or Mag. 1st class
	If committed on the high way between sunset and sunrise.	Ditto ...	Ditto ..	Ditto ...	Ditto ...	Ditto
393	Attempt to commit robbery	Ditto ...	Ditto ..	Ditto ..	R. I for 10 years and fine.	Ditto
394	Person voluntarily causing hurt in committing or attempting to commit robbery, or any other person jointly concerned in such robbery	Ditto ...	Ditto ...	Ditto ..	Ditto ...	Ditto
		Ditto ...	Ditto ..	Ditto ..	R. I for 14 years and fine	Ditto
		Ditto ...	Ditto ..	Ditto ..	R. I for 7 years and fine.	Ditto
		Ditto ...	Ditto ..	Ditto ..	Trans for life, or R. I for 10 years and fine.	Ditto
395	Dacoity	Ditto ...	Ditto ..	Ditto ...	Ditto	Ct of Ses.
396	Murder in dacoity	Ditto ..	Ditto ..	Ditto ..	Death, trans. for life, or R. I for 10 years and fine.	Ditto.
397	Robbery or dacoity with attempt to cause death or grievous hurt.	Ditto ...	Ditto ..	Ditto ..	R. I for not less than 7 years	Ditto
398	Attempt to commit robbery or dacoity when armed with deadly weapon	Ditto ...	Ditto ...	Ditto ...	Ditto ..	Ditto
399	Making preparation to commit dacoity.	Ditto ..	Ditto ...	Ditto ..	Ditto ..	Ditto
		Ditto ..	Ditto ..	Ditto ..	R. I for 10 years and fine	Ditto

Section	Offence	Cognizable or not	Warrant or summons	Bailable or not	Com- poundable or not	Punishment under the I P. C	By what Court triable
400	Belonging to a gang of persons associated for the purpose of habitually committing dacoity	Cog	Warrant	Not B	Not Com	Trans for life, or r g imp for 10 years and fine	Ct of Ses
401	Belonging to a wandering gang of persons associated for the purpose of habitually committing thefts	Ditto	Ditto	Ditto	Ditto	R 1 for 7 years and fine	Ct of Ses P Mag or Mag 1st class
402	Being one of five or more persons assembled for the purpose of committing dacoity	Ditto	Ditto	Ditto	Ditto	Ditto	Ct of Ses
<i>Of Criminal Misappropriation of Property</i>							
403	Dishonest misappropriation of moveable property, or converting it to one's own use	Not Cog	Warrant	Bailable	Not Com	Imp e d for 2 years, Any Mag or fine, or both.	
404	Dishonest misappropriation of property, knowing that it was in possession of a deceased person	Ditto	Ditto	Ditto	Ditto	Imp e d for 3 years and fine	Ct of Ses, P Mag, or Mag. 1st or 2nd class

Of Criminal Misappropriation of Property

403	Dishonest misappropriation of moveable property, or converting it to one's own use	Not Cog	Warrant	Bailable	Not Com	Imp e d for 2 years, or fine, or both,	Any Mag
404	Dishonest misappropriation of property, knowing that it was in possession of a deceased person at his death, and that it has not since been in the possession of any person legally entitled to it	Ditto	Ditto	Ditto	Ditto	Imp e d for 3 years and fine	Ct of Ses, P Mag, or Mag. 1st or 2nd class

	If by clerk or person employed by decedent	Ditto	Ditto	Ditto	Imp e d for 7 years and fine	Ditto
<i>Of Criminal Breach of Trust</i>						
406	Criminal breach of trust	Cog	Warrant	Not B	Not Com	Imp e d for 3 years, or fine or both
407	Criminal breach of trust by a carrier wharfinger, &c	Ditto	Ditto	Ditto	Ditto	Imp e d for 7 years and fine
408	Criminal breach of trust by a clerk or servant	Ditto	Ditto	Ditto	Ditto	Ditto
409	Criminal breach of trust by public servant or by banker merchant or agent &c	Ditto	Ditto	Ditto	Ditto	Trans for life or imp e d for 10 years and fine
<i>Of the Receiving of Stolen Property</i>						
411	Dishonestly receiving stolen property knowing it to be stolen	Cog	Warrant	Not B . .	Not Com	Imp e d for 3 years or fine, or both
412	Dishonestly receiving stolen property knowing that it was obtained by d'scenty	Ditto	Ditto	Ditto	Ditto	Trans for life, or imp for 10 years and fine
413	Habitually dealing in stolen property	Ditto	Ditto	Ditto	Ditto	Trans for life, or imp e d for 10 years and fine
414	Assisting in concealment or disposal of stolen property knowing it to be stolen	Ditto	Ditto	Ditto	Ditto	Imp e d for 3 years, or fine or both
						Ct of Ses, P Mag, or Mag 1st or 2nd class

Section.	1	2	3	4	5	6	7	8
		Offence	Cognizable or not.	Warrant or summons.	Bailable or not.	Com- poundable or not	Punishment under the I. P. C.	By what Court triable.
430		Mischief by causing diminution of supply of water for agricultural purposes, &c	Cog. ...	Warrant	Bailable	Com. with Ct.'s permission	Imp e. d. for 5 years, or fine, or both	Ct. of Ses., P. Mag., or Mag. 1st or 2nd class
431		Mischief by injury to public road, bridge, navigable river, or navigable channel and rendering it impassable or less safe for travelling or conveying property.	Ditto ...	Ditto ...	Ditto ...	Not Com.	Ditto...	Ditto.
432		Mischief by causing inundation or obstruction to public drainage, attended with damage.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ..	Ditto
433		Mischief by destroying, or moving, or rendering less useful a light house, or sea mark, or by exhibiting false lights	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imp e d for 7 years, or fine, or both.	Ct. of Ses
434		Mischief by destroying, or moving, etc., a land mark fixed by public authority.	Not Cog.	Ditto ...	Ditto ...	Ditto ...	Imp. e. d. for 1 year, or fine, or both	P. Mag. or Mag. 1st or 2nd class.

435	Mischief by fire, or explosive substance with intent to cause damage to amount of 100 rupees, or upwards, or in case of agricultural produce, 10 rupees, or upwards.	Cog ...	Ditto ...	Ditto ...	Ditto ...	Imp e d for 7 years and fine	Ct. of Ses, P. Mag or Mag. 1st class.
436	Mischief by fire, or explosive substance with intent to destroy a house, etc	Ditto ..	Ditto ...	Not B .	Ditto	Trans for life, or Imp e d for 10 years, and fine	Ct. of Ses
437	Mischief with intent to destroy or make unsafe a decked vessel, or a vessel of 20 tons burden	Ditto ..	Ditto ..	Ditto ...	Ditto ...	Imp e d for 10 years and fine	Ditto.
438	The mischief described in the last section when committed by fire or any explosive substance	Ditto .	Ditto	Ditto ...	Ditto	Trans for life, or Imp e d for 10 years, and fine	Ditto
439	Running vessel ashore with intent to commit theft, etc	Ditto .	Ditto ..	Ditto ...	Ditto ...	Imp e d for 10 years and fine	Ditto
440	Mischief committed after preparation made for causing death, or hurt, etc	Ditto	Ditto	Ditto ...	Ditto	Imp e d for 5 years and fine	Ct. of Ses, P. Mag, or Mag. 1st class,
<i>Of Criminal Trespass</i>							
447	Criminal trespass	Cog ...	Summoos	Bailable	Com ...	Imp e d. for 3 months, or fine, or both	Any Mag.
448	House trespass	Ditto	Warrant	Ditto ...	Ditto ...	Imp e d. for 1 year, or fine or both	Ditto.
449	House trespass in order to the commission of an offence punishable with death.	Ditto ..	Ditto ..	Not B ...	Not Com	Trans for life, or rig. imp for 10 years and fine	Ct. of Ses.

Section.	1	2	3	4	5	6	7	8
		Offence	Cognizable or not.	Warrant or summons.	Bailable or not.	Com- poundable or not	Punishment under the P. C.	By what Court triable
430		Mischief by causing diminution of supply of water for agricultural purposes, &c	Cog. ...	Warrant	Bailable	Com with Ct's permission	Imprisonment for 5 years, or fine, or both	Ct of Ses., P. Mag., or Mag 1st or 2nd class
431		Mischief by injury to public road, bridge, navigable river, or navigable channel and rendering it impassable or less safe for travelling or conveying property.	Ditto ..	Ditto ...	Ditto ..	Not Com	Ditto...	Ditto.
432		Mischief by causing inundation or obstruction to public drainage, attended with damage	Ditto ..	Ditto ...	Ditto ...	Ditto ...	Ditto ..	Ditto
433		Mischief by destroying, or moving, or rendering less useful a light house, or sea mark, or by exhibiting false lights	Ditto ..	Ditto ...	Ditto ..	Ditto	Imprisonment for 7 years, or fine, or both.	Ct of Ses
434		Mischief by destroying, or moving, etc., a land mark fixed by public authority	Not Cog.	Ditto ...	Ditto ..	Ditto ..	Imprisonment for 1 year, or fine, or both	P. Mag or Mag 1st or 2nd class.

435	Mischief by fire, or explosive substance with intent to cause damage to amount of 100 rupees, or upwards, or in case of agricultural produce, 10 rupees, or upwards	Cog	...	Ditto	.	Ditto	...	Ditto	...	Imp e d for 7 years and fine	Ct. of Ses, P. Mag. or Mag. 1st class.
436	Mischief by fire, or explosive substance with intent to destroy a house, etc	Ditto	..	Ditto	...	Not B	...	Ditto	.	Trans for life, or Imp e. d for 10 years, and fine.	Ct. of Ses
437	Mischief with intent to destroy or make unsafe a decked vessel, or a vessel of 20 tons burden	Ditto	..	Ditto	..	Ditto	...	Ditto	...	Imp e. d. for 10 years and fine	Ditto.
438	The mischief described in the last section when committed by fire or any explosive substance	Ditto	Ditto	Ditto	...	Ditto	...	Ditto	.	Trans for life, or Imp e. d for 10 years, and fine	Ditto
439	Running vessel ashore with intent to commit theft, etc	Ditto	.	Ditto	..	Ditto	...	Ditto	...	Imp e d for 10 years and fine	Ditto
440	Mischief committed after preparation made for causing death, or hurt, etc	Ditto	..	Ditto	Ditto	Ditto	.	Ditto	...	Imp e d for 5 years and fine	Ct. of Ses, P. Mag. or Mag. 1st class.
<i>Of Criminal Trespass</i>											
447	Criminal trespass	Cog	...	Summons	Bailable	Com.	...	Imp e d for 3 months, or fine, or both	Any Mag.		
448	House trespass	Ditto	..	Warrant	Ditto	...	Ditto	Imp e d for 1 year, or fine or both.	Ditto.		
449	House trespass in order to the commission of an offence punishable with death.	Ditto	...	Ditto	...	Not B	...	Not Com.		Trans for life, or rig. imp for 10 years and fine	Ct. of Ses.

Section.	Offence.	Cognizable Warrant or or not summons.	Bailable or not.	Com- poundable or not	Punishment under the I P. C.	By what Court triable.	
450	House trespass in order to the commission of an offence punishable with trans for life	Cog ...	Warrant	Not B ...	Not Com	Imp e d for 10 years and fine	Ct of Ses
451	House trespass in order to the commission of an of- fence punishable with imp If the offence is theft	Ditto ..	Ditto ...	Bailable	Com with Ct's permission	Imp e d for 2 years, and fine	Any Mag
452	House trespass, having made preparation for causing hurt, assault, etc	Ditto ...	Ditto ..	Ditto ..	Not Com	Imp e d for 7 years, and fine	Ct of Ses, P. Mag, or Mag, 1st or 2nd class.
453	Lurking house trespass or house breaking	Ditto ...	Ditto .	Ditto ...	Ditto ..	Imp e d for 2 years, and fine.	P Mag, or Mag, 1st or 2nd class.
454	Lurking house trespass or house breaking in order to the commission of an of- fence punishable with imp If the offence is theft	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imp e d for 3 years, and fine	Ct of Ses, P. Mag, or Mag, 1st or 2nd. class.
455	Lurking house trespass or house breaking after pre- paration made for causing hurt, assault, etc	Ditto ...	Ditto ...	Ditto ...	Ditto ..	Imp e d for 10 years and fine.	Ditto.
		Ditto ...	Ditto ...	Ditto ..	Ditto ..	...	Ct of Ses, P. Mag. or Mag, 1st class

456	Lurking house trespass or house breaking by night	Ditto ...	Ditto ..	Ditto ...	Imp e d. for 3 years, and fine	Ct. of Ses, P. Mag., or Mag. 1st or 2nd class.
457	Lurking house trespass or house breaking by night in order to the commission of on offence punishable with imp	Ditto ..	Ditto ...	Ditto ...	Imp e d for 5 years and fine.	Ditto.
	If the offence is theft ...	Ditto ...	Ditto ...	Ditto ...	Imp e d for 14 years, and fine	Ditto.
458	Lurking house trespass or house breaking by night, after preparation made for causing hurt, etc	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ct of Ses, P. Mag., or Mag. 1st class.
459	Grievous hurt caused whilst committing lurking house trespass or house breaking	Ditto ...	Ditto ...	Ditto ..	Trans for life, or Imp e d for 10 years and fine	Ct of Ses
460	Death or grievous hurt caused by one of several persons jointly concerned in house breaking by night, etc	Ditto ..	Ditto ...	Ditto .	Ditto ...	Ditto.
461	Dishonestly breaking open or unfastening any closed receptacle containing or supposed to contain property	Ditto ...	Ditto ...	Bailable	Ditto ...	Imp e d. for 2 years, P Mag., or Mag. 1st or 2nd class.
462	Being entrusted with any closed receptacle containing or supposed to contain any property, and fraudulently opening the same.	Ditto ...	Ditto ...	Ditto ...	Imp e d. for 3 years or fine, or both.	Ct. of Ses, P. Mag., or Mag. 1st or 2nd class.

CHAPTER XVIII—OFFENCES RELATING TO DOCUMENT AND TO TRADE OR PROPERTY MARKS

Section	1	2	3	4	5	6	7	8
		Offences	Cognizable or not	Warrant or summons	Bailable or not	Com- poundable or not	Punishment under the I P C	By what Court triable
465		Forgery	Not Cog	Warrant	Bailable	Not Com	Imp e d for 2 years or fine, or both	Ct of Ses, P Mag or Mag 1st class
466		Forgery of a record of a Ct of Justice or of a Register of Births, etc., kept by a public servant	Ditto	Ditto	Not B	Ditto	Imp e d for 7 years and fine	Ct of Ses
467		Forgery of a valuable security, will, or authority to make or transfer any valuable security, or to receive any money etc When the valuable security is a promissory note of the Govt of India	Ditto	Ditto	Ditto	Ditto	Trans for life, or Imp e d for 10 years and fine	Ditto
468		Forgery for the purpose of cheating	Cog	Ditto	Ditto	Ditto	Ditto	Ditto
469		Forgery for the purpose of harming the reputation of any person or knowing that it is likely to be used for that purpose	Not Cog	Ditto	Ditto	Ditto	Imp e d for 7 years and fine	Ct of Ses, P Mag or Mag 1st class
			Ditto	Ditto	Bailable	Ditto	Imp e d for 3 years and fine	Ditto

471	Using as genuine a forged document which is known to be forged When the forged document is a promissory note of the Govt of India	Ditto	Ditto	Ditto	Punishment for forgery of such document	Same as that by which the forgery is triable
472	Making or counterfeiting a seal, plate, etc., with intent to commit a forgery punishable under Sec 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc., knowing the same to be counterfeit	Cog	Ditto	Ditto	Ditto	.. Ct of Ses
473	Making or counterfeiting a seal, plate, etc., with intent to commit a forgery punishable otherwise than under Section 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc., knowing the same to be counterfeit	No Cog	Ditto	Ditto	Trans for life, or Imp e d for 7 years and fine	Ditto
474	Having possession of a document, knowing it to be forged, with intent to use it as genuine, if the document is one of the description mentioned in Section 466 of the Indian Penal Code	Ditto	Ditto	Ditto	Imp e d for 7 years, and fine	Ditto

Section	1	2	3	4	5	6	7	8
		Offence	Cognizable or not	Warrant or summons	Bailable or not	Com- poundable or not	Punishment under the I P C	By what Court triable.
489		Removing, destroying, or defacing any property mark with intent to cause injury	Not Cog	Summons	Bailable	Not Com	Imp e d for 1 year, or fine, or both	P Mag, or Mag 1st or 2nd class
<i>Of Currency Notes and Bank Notes</i>								
489 A		Counterfeiting currency or bank notes	Cog	Warrant	Not B	Not Com	Trans for life, or imp e d for 10 years, and fine	Ct of Ses
489 B		Using as genuine forged or counterfeit currency notes or bank notes	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
489 C		Possession of forged or counterfeit currency notes or bank notes	Ditto	Ditto	Bailable	Ditto	Imp e d for 7 years, or fine, or both	Ditto
489 D		Making or possessing instruments or materials for forging or counterfeiting currency notes or bank notes	Ditto	Ditto	Not B	Ditto	Trans for life or imp e d for 10 years and fine	Ditto
CHAPTER XIX—CRIMINAL BREACH OF CONTRACTS OF SERVICE								
490		Being bound by contract to render personal service during a voyage or journey or to convey or guard any property or person and voluntarily omitting to do so	Not Cog	Summons	Bailable	Com	Imp e d for 1 month, or fine of 100 rupees, or both	P Mag, or Mag 1st or 2nd class

491	Being bound to attend on or supply the wants of a person who is helpless from youth, unsoundness of mind or disease, and voluntarily omitting to do so	Ditto	Ditto	Ditto	Ditto	Imp e d for 3 months, or fine, or both	Ditto
492	Being bound by contract to render personal service for a certain period at a distant place to which the employee is conveyed at the expense of the employer and voluntarily deserting the service or refusing to perform the duty	Ditto	Ditto	Ditto	Ditto	Imp e d for 1 month, or fine, or double the expense incurred or both	Ditto
493	A man by deceit causing a woman not lawfully married to him to believe that she is lawfully married to him and to cohabit with him in that belief	Not Cog	Warrant	Not B	Not Com	Imp e d for 10 years, and fine	Ct of Ses
494	Marrying again during the lifetime of a husband or wife	Ditto	Ditto	Bailable	Com with Ct s permission	Imp e d for 7 years and fine	Ct of Ses, 1 st class
495	Same offence with concealment of the former marriage from the person with whom subsequent marriage is contracted	Ditto	Ditto	Ditto	Not Com	Imp e d for 10 years and fine	Ct of Ses

CHAPTER XX—OFFENCES RELATING TO MARRIAGE.

1	2	3	4	5	6	7	8
Section	Offence	Cognizable or not	Warrant or summons	Bailable or not	Compoundable or not	Punishment under the I P C	By what Court triable
489	Removing, destroying, or defacing any property mark with intent to cause injury	Not Cog	Summons	Bailable	Not Com	Imprisoned for 1 year, or fine, or both	P Mag, or Mag 1st or 2nd class
<i>Of Currency Notes and Bank Notes</i>							
489 A	Counterfeiting currency or bank notes	Cog	Warrant	Not B	Not Com	Trans for life, or imprisoned for 10 years and fine	Ct of Ses
489 B	Using as genuine forged or counterfeit currency notes or bank notes	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
489 C	Possession of forged or counterfeit currency notes or bank notes	Ditto	Ditto	Bailable	Ditto	Imprisoned for 7 years, or fine or both	Ditto
489 D	Making or possessing instruments or materials for forging or counterfeiting currency notes or bank notes	Ditto	Ditto	Not B	Ditto	Trans for life or imprisoned for 10 years and fine	Ditto
CHAPTER XIX—CRIMINAL BREACH OF CONTRACTS OF SERVICE							
490	Being bound by contract to render personal service during a voyage or journey or to convey or guard any property or person and voluntarily omitting to do so	Not Cog	Summons	Bailable	Com	Imprisoned for 1 month, or fine of 100 rupees or both	P Mag, or Mag 1st or 2nd class

SCHEDULE III

(See section 36)

ORDINARY POWERS OF PROVINCIAL MAGISTRATES.

1—*Ordinary Powers of a Magistrate of the Third Class*

- (1) Power to arrest or direct the arrest of and to commit to custody a person committing an offence in his presence, S 64
- (2) Power to arrest or direct the arrest in his presence of an offender, S 65
- (3) Power to endorse a warrant, or to order the removal of an accused person arrested under a warrant, Ss 87, 88 and 89
- (4) Power to issue proclamation in cases judicially before him, S 87
- (5) Power to attach and sell property and to dispose of claims to attached property in cases judicially before him S 82
- (6) Power to restore attached property S 89
- (7) Power to require search to be made for letters and telegrams, S 95
- (8) Power to issue search warrant S 96
- (9) Power to endorse a search warrant and order delivery of thing found S 99
- (10) Power to command unlawful assembly to disperse S 127
- (11) Power to use civil force to disperse unlawful assembly, S 128
- (12) Power to require military force to be used to disperse unlawful assembly S 131
- (13) { " " " " }
- (14) Power to authorise detention not being detention in the custody of the Police of a person during a police investigation S 167
- (14A) Power to postpone issue of process and enquire into case himself S 262
- (15) Power to detain an offender found in court S 351
- (16) Power to take cognizance of offence although committed by European British subject and to issue process returnable before a Magistrate having jurisdiction S 415
- (17) Power to apply to district Magistrate to issue commission for examination of witness S 461 (2)
- (18) Power to recover forfeited bond for appearance before Magistrate's Court S 511 and to require fresh security S 511A
- (18A) Power to make order as to custody and disposal of property pending inquiry or trial S 516A
- (19) Power to make order as to disposal of property S 517
- (20) Power to sell " " " property of a suspected character, S 525
- (21) Power to require affidavit in support of application S 529A
- (22) Power to make local inspection S 529B

CHAPTER XXIII.—ATTEMPTS TO COMMIT OFFENCES

Section.	1	2	3	4	5	6	7	8
		Offence	Cognizable or not	Warrant or summons.	Bailable or not	Com- poundable or not.	Punishment under the 1 P. C.	By what Court triable.
511		Attempting to commit offences punishable with trans or imp and in such attempt doing any act towards the commission of the offence.	As in the offence attempt- ed	As in the offence attempt- ed	As in the offence attempt- ed	As in the offence attempt- ed	Trans or Imp not exceeding $\frac{1}{2}$ of the longest term, provided for the offence, or fine, or both	The Ct by which the offence attempted is triable
OFFENCES AGAINST OTHER LAWS								
		If punishable with death, trans or imp for 7 years, or upwards	Cog ...	Warrant	Not B ...	Not Com	..	Ct of Ses
		If punishable with imprisonment for 3 years and upwards, but less than 7 years.	Ditto ...	Ditto .	Ditto, except in cases under the Indian Arms Act, Sec 19, which shall be bailable	Ditto	...	Ct of Ses P Mag or Mag 1st class
		If punishable with imp for one year and upwards, but less than 3 years	Not Cog.	Summons	Bailable	Ditto	...	Ct of Ses, P Mag, or Mag. 1st or 2nd class
		If punishable with imprisonment for less than one year, or with fine only.	Ditto .	Ditto ..	Ditto . .	Ditto .	.	Any Mag.

SCHEDULE III

(See section 36)

ORDINARY POWERS OF PROVINCIAL MAGISTRATES.

1 — *Ordinary Powers of a Magistrate of the Third Class*

- (1) Power to arrest or direct the arrest of, and to commit to custody a person committing an offence in his presence, S 64
- (2) Power to arrest or direct the arrest in his presence of an offender, S 65
- (3) Power to endorse a warrant or to order the removal of an accused person arrested under a warrant, Ss 83, 84 and 86
- (4) Power to issue proclamation in cases judicially before him, S 87
- (5) Power to attach and sell property *and to dispose of claims to attached property* in cases judicially before him S 88
- (6) Power to restore attached property S 89
- (7) Power to require search to be made for letters and telegrams, S 95
- (8) Power to issue search warrant S 96
- (9) Power to endorse a search warrant and order delivery of thing found S 99
- (10) Power to command unlawful assembly to disperse S 127
- (11) Power to use civil force to disperse unlawful assembly, S 128
- (12) Power to require military force to be used to disperse unlawful assembly S 130
- (13) [* * * *]
- (14) Power to authorise detention *not being detention in the custody of the Police* of a person during a police investigation S 167
- (14A) *Power to postpone issue of process and enquire into case himself* S 202
- (15) Power to detain an offender found in court S 351
- (16) Power to take cognizance of offence although committed by European British subject and to issue process returnable before a Magistrate having jurisdiction S 445
- (17) Power to apply to district Magistrate to issue commission for examination of witness S 506 (2)
- (18) Power to recover forfeited bond for appearance before Magistrate's Court S 514 *and to require fresh security*, S 514A
- (18A) *Power to make order as to custody and disposal of property pending inquiry or trial* S 516A
- (19) Power to make order as to disposal of property, S 517
- (20) Power to sell * * * property of a suspected character, S 525
- (21) *Power to require affidavit in support of application*, S 539 1
- (22) *Power to make local inspection*, S 539B

- (16) Power to sentence European British subject to more than three months imprisonment or one thousand rupees fine, or both S 446
- (17) Power to appoint person to be public prosecutor in particular case S 492 (2)
- (18) Power to issue commission for examination of witness Ss 503 506
- (19) Power to hear appeals from or revise orders passed under Ss 514 515
- (20) Power to compel restoration of abducted female S 552

SCHEDULE IV

(See sections 37 and 38)

ADDITIONAL POWERS WITH WHICH PROVINCIAL MAGISTRATES MAY BE INVESTED

POWERS WITH WHICH A MAGISTRATE OF THE FIRST CLASS MAY BE INVESTED	By the Local Government	(1) Power to require security for good behaviour in case of sedition S 108
		(2) Power to require security for good behaviour S 110
		(3) [" " "]
		(4) Power to make orders prohibiting repetitions of nuisances S 143
		(5) Power to make orders under S 144
		(6) [" " "]
		(7) Power to issue process for person within local jurisdiction who has committed an offence outside the local jurisdiction S 186
		(8) Power to take cognizance of offences upon police reports S 190
		(9) Power to take cognizance of offences upon police reports S 190
		(10) Power to take cognizance of offences without complaint S 190
		(11) Power to try summarily S 260
		(12) Power to hear appeals from convictions by Magistrates of the second and third classes S 107
		(13) Power to sell property alleged or suspected to have been stolen, etc S 524
		(14) [" " "]
		(15) Power to try cases under S 124 A of the Indian Penal Code
	By the District Magistrate	(1) Power to make orders prohibiting repetitions of nuisances S 143
		(2) Power to make orders under S 144

POWERS WITH WHICH A MAGISTRATE OF THE FIRST CLASS MAY BE INVESTED	By the District Magistrate	(3) [* * *] (4) Power to take cognizance of offences upon complaint, S 190 (5) Power to take cognizance of offences upon police reports S 190 (6) Power to transfer cases, S 192
	By the Local Government	(1) [* * *] (2) Powers to make orders prohibiting repetitions of nuisances, S 143 (3) Power to make orders under S 144 (3a) <i>Power to record statements and confessions during a police investigation S 164</i> (3b) <i>Power to authorize detention of a person in the custody of the Police during a Police investigation S 167</i> (4) Power to hold inquests, S 174 (5) Power to take cognizance of offences upon complaint, S 190 (6) Power to take cognizance of offences upon police reports S 190 (7) Power to take cognizance of offences without complaint, S 190 (8) Power to commit for trial S 206 (9) Power to make orders as to first offenders S 362
POWERS WITH WHICH A MAGISTRATE OF THE SECOND CLASS MAY BE INVESTED	By the District Magistrate	(1) Power to make orders prohibiting repetitions of nuisance S 143 (2) Power to make orders under S 144 (3) Power to hold inquests S 174 (4) Power to take cognizance of offences upon complaint S 190 (5) Power to take cognizance of offences upon police reports S 190
	By the Local Government	(1) Power to make orders prohibiting repetitions of nuisances S 143 (2) [* * *], (3) Power to hold inquests S 174 (4) Power to take cognizance of offences upon complaint S 190 (5) Power to take cognizance of offences upon police reports, S. 190 (6) [* * *]

POWERS WITH WHICH A SUBDIVISIONAL MAGISTRATE MAY BE INVESTED	BY THE DISTRICT MAGISTRATE	(1) Power to make orders prohibiting repetition of nuisances S 143
		(2) [* * *]
		(3) Power to hold inquest S 174
		(4) Power to take cognizance of offences upon complaint, S 190
		(5) Power to take cognizance of offences upon police reports, S 190
	BY THE LOCAL GOVERNMENT	{
		POWERS TO CALL FOR RECORDS S 435

SCHEDULE V

(See section 555)

FORMS

I—SUMMONS TO AN ACCUSED PERSON

(See section 68)

To _____ of _____

WHEREAS your attendance is necessary to answer to a charge of
(state shortly the offence charged) you are hereby required to appear
in person (or by pleader as the case may be) before the *(Magistrate)*
of _____, on _____

the _____ day of _____ Herein full not

Dated this _____ day of _____ 19____

(Seal) (Signature)

II—WARRANT OF ARREST

(See section 75)

To *(name and designation of the person or persons who is or are to execute the warrant)*

WHEREAS _____ of _____ stands charged
with the offence of *(state the offence)* you are hereby directed to
arrest the said _____

and to produce him before me Herein full not

Dated this _____ day of _____ 19____

(Seal) (Signature)

(See section 76)

This warrant may be endorsed as follows—

If the said _____ shall give bail himself in the sum
of _____ with one surety in the sum of _____
(or two sureties each in the sum of _____) to attend
before me on the _____ day of _____ and to

ted) the offence of (*mention the offence concisely*) and a warrant has been issued to compel the attendance of (*name, description and address of the witness*) before this Court to be examined touching the matter of the said complaint, and whereas it has been returned to the said warrant that the said (*name of witness*) cannot be served, and it has been shown to my satisfaction that he has absconded (*or is concealing himself to avoid the service of the said warrant*)

Proclamation is hereby made that the said (*name*) is required to appear at (*place*) before the Court of

on the _____ day of _____ next
at _____ o'clock to be examined touching
the offence complained of

Dated this _____ day of _____ 19____
(Seal) (Signature)

VI—ORDER OF ATTACHMENT TO COMPEL THE ATTENDANCE OF A WITNESS (See section 88)

To the Police-officer in charge of the Police station at _____

WHEREAS a warrant has been duly issued to compel the attendance of (*name, description and address*) to testify concerning a complaint pending before this Court, and it has been returned to the said warrant that it cannot be served, and whereas it has been shown to my satisfaction that he has absconded (*or is concealing himself to avoid the service of the said warrant*) and thereupon a Proclamation has been or is being duly issued and published requiring the said _____ to appear and give evidence at the time and place mentioned therein [* * *]

This is to authorize and require you to attach by seizure the moveable property belonging to the said _____ to the value of _____ rupees which you may find within the District of _____ and to hold the said property under attachment pending the further order of this Court, and to return this warrant with an endorsement certifying the manner of its execution

Dated this _____ day of _____ 19____
(Seal) (Signature)

ORDER OF ATTACHMENT TO COMPEL THE APPEARANCE OF A PERSON ACCUSED (See section 88)

To (*name and designation of the person or persons who is or are to execute the warrant*)

WHEREAS complaint has been made before me that (*name, description and address*) has committed (*or is suspected to have committed*) the offence of _____ punishable under section _____ of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (*name*) cannot be found, and warrant) and thereupon a Proclamation has been or is being duly the said charge within _____ days; and whereas the warrant) and thereupon a Proclamation has been or is being duly issued and published requiring the said _____ to appear to answer

the said charge within _____ days, and whereas the said _____ is possessed of the following property other than land paying revenue to Government in the village (or town) of _____ in the District of _____ and an order has been made for the attachment thereof

You are hereby required to attach the said property by seizure, and to hold the same under attachment pending the further order of this Court and to return this warrant with an endorsement certifying the manner of its execution

Dated this _____ day of _____ 19____

(Seal) _____ (Signature)

ORDER AUTHORIZING AN ATTACHMENT BY THE DEPUTY COMMISSIONER AS COLLECTOR
(See section 88)

To the Deputy Commissioner of the District of _____

WHEREAS complaint has been made before me that (name description and address) has committed (or is suspected to have committed) the offence of _____ punishable under section _____ of the Indian Penal Code and it has been returned to a warrant of arrest thereupon issued that the said (name) cannot be found, and whereas it has been shown to my satisfaction that the said (name) has absconded (or is concealing himself to avoid the service of the said warrant) and thereupon a Proclamation has been or is being duly issued and published requiring the said _____ to appear to answer the said charge within _____ days [* * *] and whereas the said _____ is possessed of certain land paying revenue to Government in the village (or town) of _____ in the district of _____

You are hereby authorized and requested to cause the said land to be attached and to be held under the attachment pending the further order of this Court and to certify without delay what you may have done in pursuance of this order

Dated this _____ day of _____ 19____

(Seal) _____ (Signature)

VII —WARRANT IN THE FIRST INSTANCE TO BRING UP A WITNESS
(See section 90)

To (name and designation of the Police-officer or other person or persons who is or are to execute the warrant)

WHEREAS complaint has been made before me that _____ has (or is suspected to have) committed the offence of _____ (mention the offence concisely) and it appears likely that (name description of witness) can give evidence concerning the said complaint, and whereas I have good and sufficient reasons to believe he will not attend as a witness on the hearing of the said complaint unless compelled to do so,

This is to authorize and require you to arrest the said (name) and on the day of to bring him before this Court to be examined touching the offence complained of

Given under my hand and the seal of the Court this
day of 19

(Seal)

(Signature)

VIII—WARRANT TO SEARCH AFTER INFORMATION OF A

PARTICULAR OFFENCE

(See section 95)

To (name and designation of the Police officer or other person or persons who is or are to execute the warrant)

WHEREAS information has been laid (or complaint has been made) before me of the commission (or suspected commission) of the offence of (mention the offence concisely) and it has been made to appear to me that the production of (specify the thing clearly) is essential to the inquiry now being made or about to be made into the said offence or suspected offence

This is to authorize and require you to search for the said (the thing specified) in the (describe the house or place or part thereof to which the search is to be confined) and if found to produce the same forthwith before this Court returning this warrant with an endorsement certifying what you have done under it immediately upon its execution

Given under my hand and the seal of the Court this
day of 19

(Seal)

(Signature)

IX—WARRANT TO SEARCH SUSPECTED PLACE OF DEPOSIT

(See section 98)

To (name and designation of a Police officer above the rank of a constable)

WHEREAS information has been laid before me and on due inquiry thereupon had I have been led to believe that the (describe the house or other place) is used as a place for the deposit (or sale) of stolen property (or if for either of the other purposes expressed in the section state the purpose in the words of the section)

This is to authorize and require you to enter the said house (or other place) with such assistance as shall be required and to use if necessary reasonable force for that purpose and to search every part of the said house (or other place or if the search is to be confined to a part specify the part clearly) and to seize and take possession of any property (or documents or stamps or seals or coins or the case may be)—[Add when the case requires it] and also of any instruments and materials which you may reasonably believe to be kept for the manufacture of forged documents or counterfeit stamps or false seals or counterfeit coin (as the case may be) and forthwith to bring before this Court such of the said things as may be taken possession of returning this warrant with an endorsement certifying

what you have done under it immediately upon its execution

Given under my hand and the seal of the Court this
day of 19

(Seal)

(Signature)

X — BOND TO KEEP THE PEACE

(See section 107)

WHEREAS I (name) inhabitant of (place) have been called upon to enter into a bond to keep the peace for the term of or until the completion of the inquiry in the matter of now pending in the Court of

I hereby bind myself not to commit a breach of the peace or do any act that may probably occasion a breach of the peace during the said term or until the completion of the said inquiry and in case of my making default therein I hereby bind myself to forfeit to Her Majesty the Queen Empress of India the sum of rupees

Dated this

day of

19

(Signature)

XI — BOND FOR GOOD BEHAVIOUR

(See sections 108, 109 and 110)

WHEREAS I (name) inhabitant of (place) have been called upon to enter into a bond to be of good behaviour to Her Majesty the Queen Empress of India and to all Her subjects for the term of (state the period) or until the completion of the inquiry in the matter of now pending in the Court of

I hereby bind myself to be of good behaviour to Her Majesty and to all Her subjects during the said term or until the completion of the said inquiry and in case of my making default therein I bind myself to forfeit to her Majesty the sum of rupees

Dated this

day of

19

(Signature)

(Where a bond with sureties is to be executed add) — We do hereby declare ourselves sureties for the abovenamed that he will be of good behaviour to Her Majesty the Queen Empress of India and to all Her subjects during the said term or until the completion of the said inquiry and in case of his making default therein we bind ourselves jointly and severally to forfeit to Her Majesty the sum of rupees

Dated this

day of

19

(Signature)

XII — SUMMONS ON INFORMATION OF A PROBABLE BREACH OF THE PEACE

(See section 114)

To of

WHEREAS it has been made to appear to me by credible information (state the substance of the information) and that you are likely to commit a breach of the peace (or by which act a breach of the peace will probably be occasioned) you are hereby required to attend in

XXI —MAGISTRATE'S ORDER TO PREVENT OBSTRUCTION, RIOT ETC
(See section 144)

To (name, description and address)

WHEREAS it has been made to appear to me that you are in possession (or have the management) of (describe clearly the property) and that, in digging a drain on the said land you are about to throw or place a portion of the earth and stones dug up upon the adjoining public road, so as to occasion risk of obstruction to persons using the road,

or

WHEREAS it has been made to appear to me that you and a number of other persons (mention the class of persons) are about to meet and proceed in a religious procession along the public street etc (as the case may be) and that such procession is likely to lead to a riot or an affray,

or

WHEREAS etc etc (as the case may be),

I do hereby order you not to place or permit to be placed any of the earth or stones dug from land on any part of the said road

or

I do hereby prohibit the procession passing along the said street and strictly warn and enjoin you not to take any part in such procession (or as the case recited may require)

Given under my hand and the seal of the Court this
day of 19

(Seal)

(Signature)

XXII —MAGISTRATE'S ORDER DECLARING PARTY ENTITLED TO RETAIN POSSESSION OF LAND ETC IN DISPUTE

(See section 145)

It appearing to me on the grounds duly recorded that a dispute likely to induce a breach of the peace existed between (describe the parties by name and residence or residence only if the dispute be between bodies of villagers) concerning certain (state concisely the subject of dispute) situate within the local limits of my jurisdiction all the said parties were called upon to give in a written statement of their respective claims as to the fact of actual possession of the said (the subject of dispute) and being satisfied by due inquiry had thereupon without reference to the merits of the claim of either of the said parties to the legal right of possession that the claim of actual possession by the said (name or names or description) is true

I do decide and declare that he is (or they are) in possession of the said (the subject of dispute) and entitled to retain such possession until ousted by due course of law and do strictly forbid any disturbance of his (or their) possession in the meantime

Given under my hand and the seal of the Court this
day of 19

(Seal)

(Signature)

XXIII—WARRANT OF ATTACHMENT IN THE CASE OF A DISPUTE AS TO
POSSESSION OF LAND, ETC

(See section 146)

To the Police-officer in charge of the Police-station at
[or, To the Collector of]

WHEREAS it has been made to appear to me that a dispute likely to induce a breach of the peace existed between (*describe the parties concerned by name and residence or residence only if the dispute be between bodies of villagers*) concerning certain (*state concisely the subject of dispute*) situate within the limits of my jurisdiction and the said parties were thereupon duly called upon to state in writing their respective claims as to the fact of actual possession of the said (*the subject of dispute*) and whereas, upon due inquiry into the said claims I have decided that neither of the said parties was in possession of the said (*the subject of dispute*) [or I am unable to satisfy myself as to which of the said parties was in possession as aforesaid],

This is to authorize and require you to attach the said (*the subject of dispute*) by taking and keeping possession thereof and to hold the same under attachment until the decree or order of a competent Court determining the rights of the parties, or the claim to possession shall have been obtained, and to return this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this
day of 19

(Seal)

(Signature)

XXIV—MAGISTRATE'S ORDER PROHIBITING THE DOING OF ANYTHING ON
LAND OR WATER

(See section 147)

A DISPUTE having arisen concerning the right of use of (*state concisely the subject of dispute*) situate within the limits of my jurisdiction the possession of which land (*or water*) is claimed exclusively by (*describe the person or persons*) and it appearing to me on due inquiry into the same that the said land (*or water*) has been open to the enjoyment of such use by the public (*or if by an individual or a class of persons describe him or them*) and (*if the use can be enjoyed throughout the year*) that the said use has been enjoyed within three months of the institution of the said inquiry (*or if the use is enjoyable only at particular seasons say "during the last of the seasons at which the same is capable of being enjoyed"*),

I do order that the said (*the claimant or claimants of possession*), or any one in their interest, shall not take (*or retain*) possession of the said land (*or water*) to the exclusion of the enjoyment of the right of use aforesaid, until he (*or they*) shall obtain the decree or order of a competent Court adjudging him (*or them*) to be entitled to exclusive possession

Given under my hand and the seal of the Court, this
day of , 19

(Seal)

(Signature)

XXI —MAGISTRATE'S ORDER TO PREVENT OBSTRUCTION, RIOT ETC
(See section 144)

To (name, description and address)

WHEREAS it has been made to appear to me that you are in possession (or have the management) of (describe clearly the property), and that, in digging a drain on the said land, you are about to throw or place a portion of the earth and stones dug up upon the adjoining public road, so as to occasion risk of obstruction to persons using the road,

or

WHEREAS it has been made to appear to me that you and a number of other persons (mention the class of persons) are about to meet and proceed in a religious procession along the public street etc, (as the case may be), and that such procession is likely to lead to a riot or an affray,

or

WHEREAS etc, etc, (as the case may be),

I do hereby order you not to place or permit to be placed any of the earth or stones dug from land on any part of the said road,

or

I do hereby prohibit the procession passing along the said street and strictly warn and enjoin you not to take any part in such procession (or as the case recited may require)

Given under my hand and the seal of the Court this
day of 19 .

(Seal)

(Signature)

XXII —MAGISTRATE'S ORDER DECLARING PARTY ENTITLED TO RETAIN
POSSESSION OF LAND ETC, IN DISPUTE

(See section 145)

It appearing to me, on the grounds duly recorded that a dispute likely to induce a breach of the peace existed between (describe the parties by name and residence or residence only if the dispute be between bodies of villagers) concerning certain (state concisely the subject of dispute) situate within the local limits of my jurisdiction all the said parties were called upon to give in a written statement of their respective claims as to the fact of actual possession of the said (the subject of dispute) and being satisfied by due inquiry had thereupon without reference to the merits of the claim of either of the said parties to the legal right of possession that the claim of actual possession by the said (name or names or description) is true,

I do decide and declare that he is (or they are) in possession of the said (the subject of dispute) and entitled to retain such possession until ousted by due course of law, and do strictly forbid any disturbance of his (or their) possession in the meantime

Given under my hand and the seal of the Court this
day of 19

(Seal)

(Signature)

XXVIII.—CHARGES.

d) Charges with one Head

(a) I [name and office of Magistrate, etc.] hereby charge you [name of accused person] as follows —

(b) that you, on or about the _____ day of _____

_____ waged war against Her Majesty the Queen, Empress of India, and thereby committed an offence punishable under S. 121 of the Indian Penal Code, and within the cognizance of the Court of Session [when the charge is framed by a Presidency Magistrate, for Court of Session substitute High Court]

(c) And I hereby direct that you be tried by the said Court on the said charge.

[Signature and seal of the Magistrate.]

[To be substituted for d1] —

(2) That you on or about the _____ day of _____ at _____ with the intention of inducing the Hon'ble A. B., Member of the Council of the Governor General of India, to refrain from exercising a lawful power as such Member, assaulted such Member and thereby committed an offence punishable under S. 121 of the Indian Penal Code and within the cognizance of the Court of Session [or High Court]

(3) That you being a public servant in the _____ Department directly accepted from [state the name] for another party [state the name] a gratification other than legal remuneration, as a motive for forbearing to do an official act and thereby committed an offence punishable under S. 161 of the Indian Penal Code and within the cognizance of the Court of Session [or High Court]

(4) That you, on or about the _____ day of _____ at _____ did [or omitted to do, as the case may be] such conduct being contrary to the provisions of Act _____ section _____ and known by you to be prejudicial to _____ and thereby committed an offence punishable under S. 166 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(5) That you, on or about the _____ day of _____ at _____ in the course of the trial of _____ before _____, stated in evidence that _____ which statement you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under S. 193 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(6) That you, on or about the _____ day of _____ at _____, committed culpable homicide not amounting to murder, causing the death of _____, and thereby committed an offence punishable under S. 304 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

XXV—BOND AND BAIL-BOND ON A PRELIMINARY INQUIRY BEFORE A
POLICE OFFICER

(See section 169)

I (name), of , being charged with the offence of ,
and after inquiry required to appear before the Magistrate of
or

and after inquiry called upon to enter into my own recognizance to
appear when required, do hereby bind myself to appear at ,
in the Court of , on the day of
next (or on such day as I may hereafter be required to attend) to
answer further to the said charge, and, in case of my making default
herein, I bind myself to forfeit to Her Majesty the Queen, Empress
of India, the sum of rupees

Dated this day of 19
(Signature)

I hereby declare myself (or we jointly and severally declare our
selves and each of us) surety (or sureties) for the above said
that he shall attend at , in the Court of , on the
day of next (or on such day as he may here-
after be required to attend), further to answer to the charge pending
against him, and in case of his making default therein, I hereby
bind myself (or we hereby bind ourselves) to forfeit to Her Majesty
the Queen, Empress of India, the sum of rupees

Dated this day of 19
(Signature)

XXVI—BOND TO PROSECUTE OR GIVE EVIDENCE

(See section 170)

I (name), of (place), do hereby bind myself to attend at
in the Court of at o'clock on the day of
next and then and there to prosecute (or to prosecute and
give evidence) (or to give evidence) in the matter of a charge of
against one 1 B, and, in case of making default herein,
I bind myself to forfeit to Her Majesty the Queen, Empress of India
the sum of rupees

Dated this day of 19
(Signature)

XXVII—NOTICE OF COMMITMENT BY MAGISTRATE TO GOVERNMENT
PLEADER

(See section 218)

The Magistrate of hereby gives notice that he has com-
mitted one for trial at the next Sessions, and the Magistrate
hereby instructs the Government Pleader to conduct the prosecution
of the said case

The charge against the accused is that, etc (state the offence as
in the charge)

Dated this day of 19
(Signature)

XXVIII - Contents

11) Materia sup. e no. 11/97.

[illegible]

to that you can expect the

waged war against Her Majesty the Queen Empress of India, and thereby committed an offence punishable by s. 121 of the Indian Penal Code, and within the cognizance of the Court of Session at Lucknow. He stands charged with a Perjury made by the Court of Session at Lucknow.

... and I think it is correct that you be held by the said Court in the said charge.

[Signature]

7. The number of people who are not in the club is 100 - 40 = 60.

Let's try to make a hypothesis about what happened at work.

The members of a House of the British India Company, Members of the Council of the Governor General of India, to refrain from exercising a lawful power as such Members, assaulted such Member, and therefore committed an offence punishable under s. 411 of the Indian Penal Code and within the cognizance of the Court of Session or High Court.

4. That you were a public servant in the Department directly exempted from State the

case for another party, still the party a
just feature other than legal representation as a motive for appearing
to do an official act and thereby committed an offence punishable
under S. 161 of the Indian Penal Code and within the cognizance
of the Court of Session for High Court.

10 That you saw or about the day of
11 at had for omitted in the

contrary to the provisions of Act No. 10 of 1887, and known by you to be prejudicial to the public interest and thereby committed an offence punishable under Section 110 of the Indian Penal Code and within the cognizance of the Court of Session (or High Court).

7) That you on or about the _____ day of _____, _____
at _____ in the course of the trial of _____

before _____, stated in evidence that _____, which statement you either knew or believed to be false or did not believe to be true and thereby committed an offense punishable under § 193 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(6) That you, on or about the _____ day of _____, at _____, committed culpable homicide not amounting to murder, causing the death of _____, and thereby committed an offence punishable under S. 301 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(7) That you, on or about the _____ day of _____, at _____, abetted the commission of suicide by A B, a person in a state of intoxication and thereby committed an offence punishable under S 306 of the Indian Penal Code and within the cognizance of the Court of Session [or High Court]

(8) That you on or about the _____ day of _____, at _____, voluntarily caused grievous hurt to _____, and thereby committed an offence punishable under S 325 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(9) That you on or about the _____ day of _____, at _____, robbed [state the name], and thereby committed an offence punishable under S 392 of the Indian Penal Code and within the cognizance of the Court of Session [or High Court]

(10) That you, on or about the _____ day of _____, at _____, committed dacoity, an offence punishable under S 395 of the Indian Penal Code and within the cognizance of the Court of Session [or High Court]

[In cases tried by Magistrates substitute "within my cognizance" for "within the cognizance of the Court of Session" and in (c) omit "by the said Court"]

(II) CHARGES WITH TWO OR MORE HEADS

(a) I [name and office of Magistrate etc] hereby charge you [name of accused person] as follows —

(1) First — That you on or about the _____ day of _____ at _____ knowing a coin to be counterfeit delivered the same to another person by name A B as genuine and thereby committed an offence punishable under S 241 of the Indian Penal Code and within the cognizance of the Court of Session [or High Court]

Secondly — That you on or about the _____ day of _____, at _____ knowing a coin to be counterfeit, attempted to induce another person by name I B to receive it as genuine and thereby committed an offence punishable under S 241 of the Indian Penal Code and within the cognizance of the Court of Session [or High Court]

(c) And I hereby direct that you be tried by the said Court on the said charge

[Signature and seal of the Magistrate]

[To be substituted for (1)] —

(2) First — That you on or about the _____ day of _____ at _____, committed murder by causing the death of _____, and thereby committed an offence punishable under S 302 of the Indian Penal Code and within the cognizance of the Court of Session [or High Court]

Secondly—That you, on or about the _____ day of _____ at _____, causing the death of _____, committed culpable homicide not amounting to murder, and thereby committed an offence punishable under S 304 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(3) *First*—That you, on or about the _____ day of _____ at _____, committed _____ theft and thereby committed an offence punishable under S 379 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

Secondly—That you, on or about the _____ day of _____ at _____ committed theft, having made preparation for causing death to a person in order to the committing of such theft and thereby committed an offence punishable under S 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

Thirdly—That you on or about the _____ day of _____ at _____ committed theft having made preparation for causing restraint to a person in order to the effecting of your escape after the committing of such theft and thereby committed an offence punishable under S 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

Fourthly—That you on or about the _____ day of _____ at _____ committed theft, having made preparation for causing fear of hurt to a person in order to the retaining of property taken by such theft and thereby committed an offence punishable under S 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(4) That you on or about the _____ day of _____ in the course of the inquiry into _____ before _____ stated in evidence that “_____ and that you, on or about the _____ day of _____ at _____, in the course of the trial of _____ before _____, stated in the evidence that “_____” one of which statements you either knew or believed to be false or did not believe to be true, and thereby committed an offence punishable under S 193 of the Indian Penal Code and within the cognizance of the Court of Session [or High Court]

[In cases tried by Magistrates substitute “within my cognizance” for “within the cognizance of the Court of Session” and in (c) omit “by the said Court”]

(III) CHARGE FOR THEFT AFTER PREVIOUS CONVICTION

I (name and office of Magistrate etc) hereby charge you (name of accused person) as follows—

That you, on or about the _____ day of _____ at _____ committed theft and thereby committed an offence punishable under S 379 of the Indian Penal Code and within the cognizance of the Court of Session [or High Court or Magistrate as the case may be]

And you the said (*name of accused*) stand further charged that you before the committing of the said offence that is to say on the day of had been convicted by the (*state Court by which conviction was had*) at of an offence punishable under Chapter XVII of the Indian Penal Code with imprisonment for a term of three years that is to say the offence of house breaking by night (*describe the offence in the words used in section under which the accused was convicted*) which conviction is still in full force and effect and that you are thereby liable to enhanced punishment under S 75 of the Indian Penal Code

And I hereby direct that you be tried etc

XXIX—WARRANT OF COMMITMENT ON A SENTENCE OF IMPRISONMENT OF FINE IF PASSED BY A MAGISTRATE

(See sections 245 and 258)

To the Superintendent (or Keeper) of the Jail at
 WHEREAS on the day of 19 (*name of prisoner*) the (1st 2nd 3rd, as the case may be) prisoner in case No of the Calendar for 19 was convicted before me (*name and official designation*) of the offence (*mention the offence or offences concisely*) under section (or sections) of the Indian Penal Code (or of Act) and was sentenced to (*state the punishment fully and distinctly*)

This is to authorize and require you the said Superintendent or Keeper to receive the said (*prisoner's name*) into your custody in the said Jail together with this warrant and there carry the afore said sentence into execution according to law

Given under my hand and the seal of the Court this day of 19
 S. H. (Signature)

XXX—WARRANT OF IMPRISONMENT ON FAILURE TO RECOVER AMENDS BY Attachment and sale

(See section 250)

To the Superintendent (or Keeper) of the Jail at
 WHEREAS (*name and description*) has brought against (*name and description of the accused person*) the complaint that (*mention it concisely*) and the same has been dismissed as false and frivolous (or vexatious) and the order of dismissal awards payment by the said (*name of complainant*) of the sum of rupees as amends and whereas the said sum has not been paid [* * *] and an order has been made for his simple imprisonment in Jail for the period of days unless the aforesaid sum be sooner paid

This is to authorize and require you the said Superintendent (or Keeper) to receive the said (*name*) into your custody together with this warrant and him safely to keep in the said Jail for the said period of (*term of imprisonment*) subject to the provisions of S 69 of the Indian Penal Code unless the said sum be sooner paid and on the receipt thereof forthwith to set him at liberty returning this

warrant with an endorsement certifying the manner of its execution
 Given under my hand and the seal of the Court this
 day of 19
 (Seal) (Signature)

XXXI—SUMMONS TO WITNESS
 (See sections 68 and 252)

To of
 WHEREAS complaint has been made before me that
 has (or is suspected to have) committed the offence of (*state the
 offence concisely with time and place*) and it appears to me that you
 are likely to give material evidence for the prosecution,
 You are hereby summoned to appear before this Court on the
 day of next at ten o'clock in the
 forenoon to testify what you know concerning the matter of the
 said complaint and not to depart thence without leave of the Court,
 and you are hereby warned that if you shall without just excuse
 neglect or refuse to appear on the said date a warrant will be issued
 to compel your attendance
 Given under my hand and the seal of the Court this
 day of 19
 (Seal) (Signature)

XXXII—PRECEPT TO DISTRICT MAGISTRATE TO SUMMON JURORS AND
 ASSESSORS
 (See section 326)

In the District Magistrate of
 WHEREAS a Criminal Session is appointed to be held in the Court
 house at on the day of next
 and the names of the persons herein stated have been duly drawn by
 lot from among those named in the revised list of Jurors and Asses-
 sors furnished to this Court you are hereby required to summon the
 said persons to attend at the said Court of Session at 10 a.m. on
 the said date and within such date to certify that you have done so
 in pursuance of this precept

(Here enter the names of Jurors and Assessors)

Given under my hand and the seal of the Court this
 day of 19
 (Seal) (Signature)

XXXIII—SUMMONS TO ASSESSOR OR JUROR
 (See section 328)

To (name) of (place)
 PURSUANT to a precept directed to me by the Court of Sessions
 of requiring your attendance as an Assessor (or a Juror)
 at the next Criminal Session you are hereby summoned to attend
 at the said Court of Session at (place) at ten o'clock in the forenoon
 on the day of next

Given under my hand and the seal of office, this
 day of 19
 (Seal) (Signature)

XXXIV—WARRANT OF COMMITMENT UNDER SENTENCE OF DEATH
 (See section 374)

To the Superintendent (or Keeper) of the Jail at

WHEREAS at the Session held before me on the day
 of 19 (name of prisoner) the 1st, 2nd 3rd (as the case may
 be) prisoner in case No of the Calendar at the said Session,
 was duly convicted of the offence of culpable homicide amounting to
 murder under section of the Indian Penal Code and
 sentenced to suffer death, subject to the confirmation of the said
 sentence by the Court of

This is to authorize and require you, the said Superintendent (or
 Keeper) to receive the said (prisoner's name) into your custody in
 the said Jail together with the warrant and him there safely to keep
 until you shall receive the further warrant or order of this Court
 carrying into effect the order of the said Court

Given under my hand and the seal of the Court, this
 day of 19
 (Seal) (Signature)

XXXV—WARRANT OF EXECUTION ON A SENTENCE OF DEATH
 (See section 381)

To the Superintendent (or Keeper) of the Jail at

WHEREAS (name of prisoner) the (1st 2nd, 3rd as the case may
 be) prisoner in case No of the Calendar at the Session held
 before me on the day of 19, has been by
 warrant of this Court, dated the day of , com-
 mitted to your custody under sentence of death, and whereas the
 order of the Court of confirming the said sentence
 has been received by this Court,

This is to authorize and require you the said Superintendent (or
 Keeper) to carry the said sentence into execution by causing the said
 to be hanged by the neck until he be dead at (time and
 place of execution) and to return this warrant to the Court with an
 endorsement certifying that the sentence has been executed

Given under my hand and the seal of the Court, this
 day of 19
 (Seal) (Signature)

XXXVI—WARRANT AFTER A COMMITMENT OF A SENTENCE
 (See sections 381 and 382)

To the Superintendent (or Keeper) of the Jail at

WHEREAS at a Session held on the day of 19
 (name of prisoner) the (1st 2nd 3rd as the case may be) prisoner
 in case No of the Calendar at the said Session was
 convicted of the offence of punishable under section

at the Indian Penal Code and sentenced to _____,
and was thereupon committed to your custody, and whereas by the
order of the _____ Court of _____ (a duplicate
of which is herewith annexed) the punishment adjudged by the said
sentence has been commuted to the punishment of transportation for
life (or as the case may be),

This is to authorize and require you the said Superintendent (or
Keeper) safely to keep the said (prisoner's name) in your custody
in the said Jail as by law is required until he shall be delivered over
by you to the proper authority and custody for the purpose of his
undergoing the punishment of transportation under the said order.

or

if the mitigated sentence is one of imprisonment, say after the words
"custody in the said Jail" and there to carry into execution the
punishment of imprisonment under the said order according to law "

Given under my hand and the seal of the Court this
day of _____ 19 _____

(Seal)

(Signature)

XXXVII—WARRANT TO TRY A DEBT BY ATTACHMENT AND SALE (See section 386 (1) (a))

To (name and designation of the Police-officer or other person or
persons who is or are to execute the warrant)

Whereas (name and description of the offender) was on the
day of _____ 19 _____ convicted before me of the offence of
(mention the offence concisely) and sentenced to pay a fine of rupees
_____ and whereas the said (name) although required to
pay the said fine has not paid the same or any part thereof,

This is to authorize and require you to attach any moveable
property belonging to the said (name) which may be found within
the district of _____, and if within (state the number of days or
hours allowed) next after such attachment the said sum shall not
be paid (or forthwith) to sell the moveable property attached or so
much thereof as shall be sufficient to satisfy the said fine returning
this warrant with an endorsement certifying what you have done
under it immediately upon its execution

Given under my hand and the seal of the Court this
day of _____ 19 _____

(Seal)

(Signature)

XXXVII A—BOND FOR APPEARANCE OF OFFENDER RELEASED PENDING REIMBURSEMENT OF FINE

(See section 388)

Whereas I, (name), inhabitant of (place) have been sentenced to
pay a fine of rupees _____ and in default of payment
thereof to undergo imprisonment for _____, and whereas
the Court has been pleased to order my release
on condition of my executing a bond for my
appearance on the following date or dates, namely —

I hereby bind myself to appear before the Court of
at *o'clock on the following date or dates namely —*
and in case of making default herein I bind myself to forfeit
to His Majesty the King Emperor of India the sum of Rupees
Dated this *day of* *19* *(Signature)*

Where a bond with sureties is to be executed add—We do hereby
declare ourselves sureties for the above named *that*
he will appear before the Court of *on the following date*
or dates namely — *and, in case of his making default*
therein we bind ourselves jointly and severally to forfeit to his Majesty
the King Emperor of India the sum of Rupees

(Signature)

**XXXVIII—WARRANT OF COMMITMENT IN CERTAIN CASES
 OF CONTEMPT WHEN A FINE IS IMPOSED**
(See section 480)

To the Superintendent (or Keeper) of the Jail at

WHEREAS at a Court holden before me on this day *(name and description of the offender)* in the presence (or view) of the Court committed wilful contempt,

And whereas for such contempt the said *(name of offender)* has been adjudged by the Court to pay a fine of rupees , or in default to suffer simple imprisonment for the space of *(state the number of months or days)*,

This is to authorize and require you, the Superintendent (or Keeper) of the said Jail, to receive the said *(name of offender)* into your custody, together with this warrant, and him safely to keep in the said Jail for the said period of *(term of imprisonment)*, unless the fine be sooner paid and on the receipt thereof, forthwith to set him at liberty returning this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this
 day of 19

(Seal)

(Signature)

**XXXIX—MAGISTRATE'S OR JUDGE'S WARRANT OF COMMITMENT
 OF WITNESS REFUSING TO ANSWER**
(See section 485)

In (name and description of officer of Court)

WHEREAS *(name and description)*, being summoned (or brought before this Court) as a witness and this day required to give evidence on an inquiry into an alleged offence refused to answer a certain question (or certain questions) put to him touching the said alleged offence and duly recorded without alleging any just excuse for such refusal and for his contempt has been adjudged detention in custody for *(term of detention adjudged)*,

This is to authorize and require you to take said *(name)* into custody and him safely to keep in your custody for the space of days unless in the meantime he shall consent to be examined and to answer the question asked of him and on the last

of the said days or forthwith on such consent being known, to bring him before this Court to be dealt with according to law, returning this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this
day of 19

(Seal)

(Signature)

XL—WARRANT OF IMPRISONMENT ON FAILURE TO PAY MAINTENANCE

(See section 488)

To the Superintendent (or Keeper) of the Jail at

WHEREAS (*name description and address*) has been proved before me to be possessed of sufficient means to maintain his wife (*name*) [or his child (*name*) who is by reason of (*state the reason*) unable to maintain herself (or himself)] and to have neglected (or refused) to do so and an order has been duly made requiring the said (*name*) to allow to his said wife (or child) for maintenance the monthly sum of rupees , and whereas it has been further proved that

the said (*name*) in wilful disregard of the said order has failed to pay rupees being the amount of the allowance for

the month (or months) of And thereupon an order was made adjudging him to undergo simple (or rigorous) imprisonment in the said Jail for the period of

This is to authorize and require you the said Superintendent (or Keeper) to receive the said (*name*) into your custody in the said Jail together with this warrant and there carry the said order into execution according to law returning this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court this
day of 19

(Seal)

(Signature)

XLI—WARRANT TO ENFORCE THE PAYMENT OF MAINTENANCE BY

Attachment and Sale

(See section 488)

To (*name and designation of the Police-officer or other person to execute the warrant*)

WHEREAS an order has been duly made requiring (*name*) to allow to his said wife (or child) for maintenance the monthly sum of rupees and whereas the said (*name*) in wilful disregard of the said order has failed to pay rupees being the amount of the allowance for the month (or months) of

This is to authorize and require you to attach any moveable property belonging to the said (*name*) which may be found within the district of and if within (*state the number of days or hours allowed*) next after such attachment the said sum shall not be paid (or forthwith) to sell the moveable property attached or so much thereof as shall be sufficient to satisfy the said sum returning

this warrant with an endorsement certifying what you have done under it immediately upon its execution

Given under my hand and the seal of the Court this
day of 19

(Seal)

(Signature)

**XLII—BOND AND BAIL BOND ON A PRELIMINARY INQUIRY BEFORE A
MAGISTRATE**

(See section 496 and 499)

I (name) of (place) being brought before the Magistrate of (as the case may be) charged with the offence of and required to give security for my attendance in his Court and at the Court of Session if required do bind myself to attend at the Court of the said Magistrate on every day of the preliminary inquiry into the said charge and should the case be sent for trial by the Court of Session to be and appear before the said Court when called upon to answer the charge against me and in case of my making default herein I bind myself to forfeit to Her Majesty the Queen Empress of India, the sum of rupees

Dated this

day of

19

(Signature)

I hereby declare myself (or we jointly and severally declare ourselves and each of us) surety (or sureties) for the said (name) that he shall attend at the Court of on every day of the preliminary inquiry into the offence charged against him and should the case be sent for trial by the Court of Session that he shall be and appear before the said Court to answer the charge against him and in case of his making default therein, I bind myself (or we bind ourselves) to forfeit to Her Majesty the Queen Empress of India the sum of rupees

Dated this

day of

19

(Signature)

**XLIII—WARRANT TO DISCHARGE PERSON IMPRISONED ON FULFILL
TO GIVE SECURITY**

(See section 300)

To the Superintendent (or the Keeper) of the Jail at
(or other officer in whose custody the person is)

WHEREAS (name and description of prisoner) was committed to your custody under warrant of this Court dated the day of and has since with his surety (or sureties) duly executed a bond under Section 199 of the Code of Criminal Procedure

This is to authorize and require you forthwith to discharge the said (name) from your custody unless he is liable to be detained for some other matter

Given under my hand and the seal of the Court this
day of 19

(Seal)

(Signature)

XLIV — WARRANT OF ATTACHMENT TO ENFORCE A BOND
(See section 514)

To the Police-officer in charge of the Police station at

WHEREAS (name description and address of person) has failed to appear on (mention the occasion) pursuant to his recognizance, and has by such default forfeited to Her Majesty the Queen, Empress of India the sum of rupees (the pecuniy in the bond), and whereas the said (name of person) has on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him,

This is to authorize and require you to attach any moveable property of the said (name) that you may find within three days, to sell the property so attached or so much of it as may be sufficient to realise the amount aforesaid and to make return of what you have done under this warrant immediately upon its execution

Given under my hand and the seal of the Court this
day of 19

(Seal)

(Signature)

XLV — NOTICE TO SURETY ON BREACH OF A BOND
(See section 511)

To of
WHEREAS on the day of 19
you became surety for (name) of (place) that he should appear before this Court on the day of and bound yourself in default thereof to forfeit the sum of rupees to Her Majesty the Queen Empress of India and whereas the said (name) has failed to appear before this Court and by reason of such default you have forfeited the aforesaid sum of rupees

You are hereby required to pay the said penalty or show cause, within days from this date why payment of the said sum should not be enforced against you

Given under my hand and the seal of the Court this
day of 19

(Seal)

(Signature)

XLVI — NOTICE TO SURETY OF FORFEITURE OF BOND FOR GOOD BEHAVIOUR

To of
WHEREAS on the day of 19 you became surety by a bond for (name) of (place) that he would be of good behaviour for the period of and bound yourself in default thereof to forfeit the sum of rupees to Her Majesty the Queen, Empress of India, and whereas the said (name) has been convicted of the offence of (mention the offence concisely) committed since you became such surety whereby your security bond has become forfeited

You are hereby required to pay the said penalty of rupees or to show cause within days why it should not be paid

Given under my hand and the seal of the Court, this
 day 19
 (Seal) _____ (Signature)

XLVII—WARRANT OF ATTACHMENT AGAINST A SURETY

To _____ of
 WHEREAS (name, description and address) has bound himself as surety for the appearance of (mention the condition of the bond), and the said (name) has made default, and thereby forfeited to Her Majesty the Queen, Empress of India, the sum of rupees (the penalty in the bond),

This is to authorize and require you to attach any moveable property of the said (name) which you may find within the district of _____, by seizure and detention, and, if the said amount be not paid within three days, to sell the property so attached, or so much of it as may be sufficient to realise the amount aforesaid, and make return of what you have done under this warrant immediately upon its execution

Given under my hand and the seal of the Court, this
 day of 19

(Seal) _____ (Signature)

XLVIII—WARRANT OF COMMITMENT OF THE SURETY OF AN ACCUSED PERSON ADMITTED TO BAIL (See section 514)

To the Superintendent (or Keeper) of the Civil Jail at

WHEREAS (name and description of surety) has bound himself as a surety for the appearance of (state the condition of the bond) and the said (name) has therein made default whereby the penalty mentioned in the said bond has been forfeited to Her Majesty the Queen, Empress of India, and whereas the said (name of surety) has, on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him, and the same cannot be recovered by attachment and sale of moveable property of his and an order has been made for his imprisonment in the Civil Jail for (specify the period)

This is to authorize and require you, the said Superintendent (or Keeper), to receive the said (name) into your custody with this warrant and him safely to keep in the said jail for the said (term of imprisonment) and to return this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this
 day of 19

(Seal) _____ (Signature)

XLIX—NOTICE TO THE PRINCIPAL OF FORFEITURE OF A BOND TO KEEP THE PEACE (See section 511)

In (state description and address),

WHEREAS on the _____ day of _____ 19, you entered into a bond not to commit etc., (as in the bond) and proof of the forfeiture of the same has been given before me and duly recorded

You are hereby called upon to pay the said penalty of rupees
or to show cause before me within days why payment
of the same should not be enforced against you

Dated this day of 19
(Seal) (Signature)

**L—WARRANT TO ATTACH THE PROPERTY OF THE PRINCIPAL ON BREACH
OF A BOND TO KEEP THE PEACE**
(See section 514)

To (name and designation of Police officer), at the Police station of
WHEREAS (name and description) did on the day of
19 enter into a bond for the sum of rupees binding himself
not to commit a breach of the peace, etc., (as in the bond) and proof
of the forfeiture of the said bond has been given before me and duly
recorded and whereas notice has been given to the said (name) call-
ing upon him to show cause why the said sum should not be paid and
he has failed to do so or to pay the said sum

This is to authorize and require you to attach by seizure moveable
property belonging to the said (name) to the value of rupees
which you may find within the district of and, if the said
sum be not paid within to sell the property so attached or
so much of it as may be sufficient to realise the same, and to make
return of what you have done under this warrant immediately upon
its execution

Given under my hand and the seal of the Court this
day of 19
(Seal) (Signature)

**11—WARRANT OF IMPRISONMENT ON BREACH OF A BOND TO KEEP
THE PEACE**
(See section 514)

To the Superintendent (or Keeper) of the Civil Jail at

WHEREAS proof has been given before me and duly recorded that
(name and description) has committed a breach of the bond entered
into by him to keep the peace whereby he has forfeited to Her
Majesty the Queen Empress of India the sum of rupees and
whereas the said (name) has failed to pay the said sum or to show
cause why the said sum should not be paid although duly called upon
to do so and payment thereof cannot be enforced by attachment of
his moveable property and an order has been made for the imprison-
ment of the said (name) in the Civil Jail for the period of (term of
imprisonment)

This is to authorize and require you the said Superintendent (or
keeper) of the said Civil Jail to receive the said (name) into your
custody together with this warrant and him safely to keep in the
said Jail for the said period of (term of imprisonment) and to return
this warrant with an affidavit certifying the manner of its execu-
tion

Given under my hand and the seal of the Court this
day of 19
(Seal) (Signature)

LI—WARRANT OF ATTACHMENT AND SALE ON FORFEITURE OF BOND FOR GOOD BEHAVIOUR

(See section 514)

To the Police-officer in charge of the Police station at

WHEREAS (*name, description and address*) did on the day of 19 give security by bond in the sum of rupees for the good behaviour of (*name, etc., of the principal*), and proof has been given before me and duly recorded of the commission by the said (*name*) of the offence of whereby the said bond has been forfeited, and whereas notice has been given to the said (*name*) calling upon him to show cause why the said sum should not be paid and he has failed to do so or to pay the said sum,

This is to authorize and require you to attach by seizure moveable property belonging to the said (*name*) to the value of rupees which you may find within the district of , and, if the said sum be not paid within , to sell the property so attached, or so much of it as may be sufficient to realise the same and to make return of what you have done under this warrant immediately upon its execution

Given under my hand and the seal of the Court, this day of 19

(Seal)

(Signature)

LIII—WARRANT OF IMPRISONMENT ON FORFEITURE OF BOND FOR GOOD BEHAVIOUR

(See section 514)

To the Superintendent (or Keeper) of the Civil Jail at

WHEREAS (*name, description and address*) did on the day of 19 , give security by bond in the sum of rupees for the good behaviour of (*name etc. of the principal*), and proof of the breach of the said bond has been given before me and duly recorded whereby the said (*name*) has forfeited to Her Majesty the Queen Empress of India, the sum of rupees , and whereas he has failed to pay the said sum or to show cause why the said sum should not be paid although duly called upon to do so and payment thereof cannot be enforced by attachment of his moveable property, and an order has been made for the imprisonment of the said (*name*) in the Civil Jail for the period of (*term of imprisonment*)

This is to authorize and require you the Superintendent (or Keeper) to receive the said (*name*) into your custody together with this warrant, and him safely to keep in the said Jail for the said period of (*term of imprisonment*), returning this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this day of 19

(Seal)

(Signature)

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